LAW OFFICES
GROVE, JASKIEWICZ AND COBERT LLP
SUITE 609
1101 17TH STREET, NORTHWEST
WASHINGTON, D.C. 20036-4718

(202) 296-2900

FAX
(202) 296-1370

WEBSITE
www.gjcobert.com

May 1, 2013

VIA EMAIL (secretary *a* fmc.gov).
(judges *a* fmc.gov)
AND HAND DELIVERY

Karen V. Gregory, Secretary
Office of the Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, et al. Federal Maritime Commission: Docket No. 09-01

Dear Ms. Gregory:

We are attorneys representing Respondents CJR World Enterprises, Inc. and Chad J. Rosenberg ("CJR Respondents") in the above captioned matter currently pending in the Federal Maritime Commission.

Please find enclosed an original and five (5) copies of the following documents submitted by CJR Respondents: (1) Response to Respondent and Cross Complainant Global Link Logistics, Inc.'s Proposed Findings of Fact in Support of its Claim for Contribution; (2) Proposed Findings of Fact in Support of their Opposition to Respondent and Cross Complainant Global Link Logistics, Inc.'s Cross-Claim for Contribution; (3) Brief in Response to Global Link Logistics, Inc.'s Opening Brief in Support of its Claims for Contribution; (4) Continuation of Appendix; and (5) Exhibits "J" through "Q."

A PDF version of the filing and where appropriate a Microsoft Word version have been emailed to both secretary *a* fmc.gov and judges *a* fmc.gov.

Please stamp a conformed copy and return same to our messenger who has been instructed to wait.

Sincerely yours,

Ronald N. Cobert

VIA EMAIL ONLY (w/encls.)

David Street (dstreet@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
GKG Law, PC
1054 31st St., Ste. 200
Washington, D.C. 20007

Warren L. Dean (wdean@thompsoncoburn.com)
Jonathan Benner (jbenner@thompsoncoburn.com)
Thomson Coburn LLP
1909 K St., N.W., Ste. 600
Washington, D.C. 20006

Andrew G. Gordon (agordon@paulweiss.com)
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064

Marc J. Fink (mfink@cozen.com)
David Y. Loh (dloh@cozen.com)
COZEN O'CONNOR
1627 I Street, NW – Suite 1100
Washington, DC 20006

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09-01

ORIGINAL

MITSUI O.S.K. LINES, LTD.,

COMPLAINANT,

v.

GLOBAL LINK LOGISTICS, INC.; OLYMPUS PARTNERS, L.P.; OLYMPUS GROWTH FUND III, L.P.; OLYMPUS EXECUTIVE FUND, L.P.; LOUIS J. MISCHIANTI; DAVID CARDENAS; KEITH HEFFERNAN; CJR WORLD ENTERPRISES, INC.; and CHAD J. ROSENBERG,

RESPONDENTS.

RECEIVED
2013 MAY -1 PM 3:13
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S RESPONSE TO RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S PROPOSED FINDINGS OF FACT IN SUPPORT OF ITS CLAIM FOR CONTRIBUTION

Pursuant to the Orders of the Administrative Law Judge and Rule 221 of the Commission's Rules of Practice and Procedure, Respondents CJR World Enterprises, Inc. ("CJRWE") and Chad J. Rosenberg (collectively, "CJR Respondents") hereby object and respond to Global Link Logistics, Inc.'s ("GLL") Proposed Findings of Fact in Support of its Claim of Contribution as follows:

Global Link and Service Contracts

1. Global Link is a non-vessel operating common carrier ("NVOCC") licensed by the Federal Maritime Commission ("FMC" or "Commission") that provides ocean transportation services. *See* Christine Callahan Dec. at ¶ 2, January 29, 2013, attached as Exhibit A (GLL App. 1).

RESPONSE: The CJR Respondents admit that GLL was an NVOCC licensed by the FMC that provided ocean transportation services until June 7, 2006. On June 7, 2006, CJRWE sold its shares of GLL to the current owners. The CJR Respondents do not have information or knowledge sufficient to respond to GLL's allegations with respect to GLL's activities following the sale.

2. CJR World Enterprises, Inc. and Chad J. Rosenberg (collectively, the "Rosenberg Respondents") and Olympus Partners, L.P., Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, David Cardenas and Keith Heffernan (collectively, the "Olympus Respondents") were defendants in an arbitration proceeding (the "Arbitration") initiated by Global Link's current ownership. The Arbitration was predicated upon the Rosenberg and Olympus Respondents having fraudulently failed to disclose the split routing practices that were ongoing at Global Link prior to the current ownership's purchase of the company. *See* American Arbitration Association, Commercial Arbitration Tribunal Partial Final Award (Case No. 14 125 Y 01447 07, February 2, 2009) ("Arbitration Award") attached hereto as Exhibit B (GLL App. 4-66).

RESPONSE: The CJR Respondents do not dispute that they and the Olympus Respondents were respondents in an arbitration proceeding initiated by GLL's current ownership, which was styled *Global Link Logistics, Inc. et al. v. Olympus Growth Fund III, L.P. et al.*, American Arbitration Association, Case No. 14 125 Y 01447 07 (the "Arbitration), and that GLL made claims in the Arbitration that the CJR Respondents and Olympus Respondents did not disclose the practice of split routing in the due diligence leading up to the 2006 sale. In the Arbitration, the CJR Respondents denied having fraudulently failed to disclose split routing to the buyers.

3. The Arbitration Panel had seven days of hearings and received pre and post hearing written submissions and oral argument. Arbitration Award at 1, Exh. B (GLL App. 4).

RESPONSE: The CJR Respondents do not dispute paragraph 3.

4. The Arbitration Panel heard the live testimony of 12 witnesses, including Chad Rosenberg, and the parties submitted excerpts from 14 depositions, including videotapes of eight depositions. *Id.* at 4 (GLL App. 7).

RESPONSE: The CJR Respondents do not dispute paragraph 4.

5. The Arbitration Panel determined that it would have been impractical for the new owners of Global Link, who acquired the company in 2006 to have attempted to end split routing all at once. *Id.* at 15 (GLL App. 18).

RESPONSE: The CJR Respondents dispute paragraph 5. The Partial Final Award issued by the Arbitration Panel ("Partial Final Award") speaks for itself and the CJR Respondents refer the ALJ to the Partial Final Award for its full text. While statements in the Partial Final Award suggest that the Arbitration Panel believed it would have been impractical for the new owners of GLL to end split routing immediately, other statements confirm that the Arbitration Panel had doubts about the timing of GLL's termination of split routing and whether it was driven by the Claimants' litigation strategy: "In assessing Claimants' position in this matter, a few points bear noting. First, not only did Meyer, Briles and the other members of Global Link management team who had allegedly deceived GTCR in the negotiations remain in the employ of the new Company; there is no evidence in the record that they were disciplined or chastised. Second, there is no mention of split-routing as being illegal or otherwise in the post-acquisition Board

minutes of Global Link Logistics or GTCR's periodic reports to its investors or bank lenders. . . . Finally, Claimants did not self-report to the FMC until May 21, 2008 ...-- nearly two months after learning of split-routing practice. Rocheleau testified that it took 'some time' to quantify the extent of split-routing, but that fact does not explain the de ay of a further year or more in notifying the FMC...." (Partial Final Award, at p. 15) (MOL Exh. A) (MOL's Appendix ("MOL App."), at p. 15).

Other statements in the Partial Final Award further demonstrate that the Panel did not believe GLL was not culpable. More specifically, in considering whether to apply the *in pari delicto* doctrine to the issues in the Arbitration, the Panel merely found that the doctrine did not apply because in continuing the practice of split routing, GLL's culpability did not rise to the level of the other Respondents' culpability. (Partial Final Award, at pp. 45-46) (MOL Exh. A) (MOL App., at pp. 45-46). Nowhere in the Partial Final Award did the Panel find that GLL's continuation of split-routing for a year after learning that such a practice was purportedly illegal was reasonable -- only that that fact did not bar the Claimants' claims.

The CJR Respondents further dispute GLL's contention in paragraph 5 that it would have been impractical for the current owners of GLL to end split routing sooner than they did. As soon as GLL received advice from counsel after the 2006 sale regarding the legality of split-routing, GLL was on notice that it could face claims like those asserted by MOL in this proceeding. Despite this knowledge, GLL did not end the practice of split routing for another year. There is no evidence demonstrating that GLL acted in a reasonable fashion in waiting for a year to end the practice of split routing. To the extent the ALJ finds MOL's claims have merit (which the CJR Respondents vigorously dispute), GLL should be held accountable for all of the

shipments at issue, including the shipments occurring during the period after GLL received advice from counsel after the 2006 sale regarding the legality of split-routing.

6. Respondent Chad Rosenberg incorporated Global Link in 1997. Chad Rosenberg Dep. at 99:18-19, October 7, 2008, attached as Exhibit C (GLL App. 82).

RESPONSE: The CJR Respondents object to paragraph 6 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is not admissible in this proceeding. The deposition of Mr. Rosenberg was taken in the Arbitration. Therefore, Mr. Rosenberg's out-of-court statements at this deposition in the Arbitration are hearsay. Prior sworn testimony may be admissible as an exception to the hearsay but only when the declarant is unavailable. *See* Fed. R. Evid. 804(b)(1); *see also Walker v. Pepsi-Cola Bottling Co* , Nos. Civ. A. 98-225-SLR, 99-748-JJF, 2000 WL 1251906, at *5 (D. Del. Aug. 10, 2000) (holding that transcript of "prior sworn testimony in an arbitration hearing" was "hearsay and not admissible . . . ."). As a party to this proceeding, Mr. Rosenberg was clearly available. His prior testimony in the Arbitration is thus inadmissible in this proceeding.

Responding further, the CJR Respondents do not dispute paragraph 6.

7. Rosenberg served as President and Chief Executive Officer of Global Link from 1997 through 2006. *Id.* at 235:2-7, 294:2-8, Exh. C (GLL App. 86, 88).

RESPONSE: The CJR Respondents object to paragraph 7 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 7.

8. Rosenberg was a member of Global Link's Board of Directors. Arbitration Award at 3, Exh. B (GLL App. 6).

RESPONSE: The CJR Respondents admit that Mr. Rosenberg was a member of GLL's Board of Directors until the sale of the company in June of 2006.

9. Rosenberg remained the principal owner of the company until 2003, when he sold approximately 80% of the company to Olympus Partners ("Olympus"), a private equity firm, and minority shares to several individuals and entities, keeping approximately 20% for himself. *Id.* at 3 n.1., and 12, Exh. B (GLL App. 6, 15).

RESPONSE: The CJR Respondents do not dispute that Mr. Rosenberg remained the principal owner of GLL until 2003, when he sold approximately 80% of the company to Olympus, a private equity firm, and minority shares to several individuals and entities. After the 2003 sale, CJRWE owned approximately 20% of the shares of GLL. Mr. Rosenberg did not own any shares of GLL following the 2003 sale. (Declaration of Chad Rosenberg, dated February 26, 2013 ("Rosenberg Dec."), at ¶¶ 7, 9, 12) (CJR Exh. A) (CJR Respondents' Appendix ("CJR App."), at pp. 2-3).[1]

10. Rosenberg sold a portion of Global Link to Olympus in 2003 for $20 million in cash. *Id.* at 3 n.1, Exh. B (GLL App. 6)

---

[1] The CJR Respondents' Appendix submitted in support of their Brief in Response to GLL's Opening Brief in Support of its Claims for Contribution ("Brief in Response to GLL") is a continuation of the Appendix the CJR Respondents submitted in support of their Brief in Response to the Opening Submission of Complainant Mitsui O.S.K. Lines, Ltd. ("Brief in Response to MOL"). Accordingly, any documents submitted to support the Brief in Response to GLL, which were not submitted to support the Brief in Response to MOL, will begin with CJR Exhibit "J" and will begin at CJR Appendix p. 102. Any citations to CJR Exhibits A through I or to CJR App. pp. 1 though 101, reference the Appendix the CJR Respondents submitted in support of their Brief in Response to MOL.

RESPONSE: The CJR Respondents do not dispute paragraph 10.

11. Subsequently, Rosenberg was a director, officer and sole shareholder of CJR World Enterprises, through which he held an approximate 20% interest in Global Link. *Id.* at 3, Exh. B (GLL App. 6).

RESPONSE: The CJR Respondents do not dispute paragraph 11.

12. Upon the Olympus Respondents' acquisition of 80% of Global Link, they installed a new management team at Global Link. *Id.* at 12 (GLL App. 15). Although Rosenberg continued to run the company, the new management team included Gary Meyer, initially as Chief Financial Officer and then promoted to Chief Operating Officer, and Jim Briles, who headed the Trade Group, which was responsible for routing shipments. *Id.* at 12-13 (GLL App. 15-16).

RESPONSE: The CJR Respondents admit that Olympus installed a new management team at GLL following the 2003 sale, and that the management team included Mr. Meyer and Mr. Briles. The CJR Respondents admit that Mr. Rosenberg was still involved with the company immediately following the 2003 sale. As the Panel in the Arbitration found, Mr. Rosenberg became less and less active in running GLL following the sale to Olympus. (Partial Final Award, at p. 33) (MOL Exh. A) (MOL App., at p. 33).

13. Upon the subsequent sale of Global Link to current ownership in 2006, CJR World Enterprises, of which Rosenberg was the sole shareholder, received an additional $20.9 million. *Id.* at 14 (GLL App. 17); *see also* Arbitration Award at 25 (GLL App. 28) ("Chad

Rosenberg having sold an 80% interest in the Company for $20 million three years earlier stood to reap another $20 million by selling his remaining interest .. ").

RESPONSE: The CJR Respondents do not dispute paragraph 13.

The Rosenberg Respondents' Participation and Knowledge of Split Routing
Deposition Testimony of Chad Rosenberg

14. Rosenberg was very familiar with the routings and operations at Global Link. Rosenberg Dep. at 54:19-22, attached as Exh. C (GLL App. 76).

RESPONSE: The CJR Respondents object to paragraph 14 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that Mr. Rosenberg was familiar with the operations at GLL. However, Mr. Rosenberg was not actively involved in GLL's day-to-day operations during the period relevant to this lawsuit and did not directly participate in any routing decisions relevant to this case. (Rosenberg Dec., at ¶¶ 21-39) (CJR Exh. A) (CJR App., at pp. 4-7); (Declaration of Jim Briles, dated February 26, 2013 ("Briles Dec."), at ¶¶ 47-48) (CJR Exh. B) (CJR App., at p. 9). Notably, the deposition testimony cited relates to a meeting concerning Maersk and does not have anything to do with MOL.

15. Rosenberg personally conducted split routings at Global Link. *Id.* at 20:15-21:12 (GLL App. 68).

RESPONSE: The CJR Respondents object to paragraph 15 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, while Mr.

Rosenberg may have personally conducted split routings during his tenure at GLL, Mr. Rosenberg was not actively involved in GLL's day-to-day operations during the period relevant to this lawsuit and did not directly participate in any routing decisions relevant to this case. (Rosenberg Dec., at ¶¶ 21-39) (CJR Exh. A) (CJR App., at pp. 4-7); (Briles Dec., at ¶¶ 47-48) (CJR Exh. B) (CJR App., at p. 9).

16. Most of the Global Link moves when he was there were split routing; approximately 60 percent of the moves were splits. *Id.* at 27:13-20 (GLL App. 69).

RESPONSE: The CJR Respondents object to paragraph 16 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 16. The CJR Respondents show further that Mr. Rosenberg was not actively involved in GLL's day-to-day operations during the period relevant to this lawsuit and did not directly participate in any routing decisions relevant to this case. (Rosenberg Dec., at ¶¶ 21-39) (CJR Exh. A) (CJR App., at pp. 4-7); (Briles Dec., at ¶¶ 47-48) (CJR Exh. B) (CJR App., at p. 9).

17. Split routing was an important part of Global Link's operations when Rosenberg was the Chief Executive Officer. *Id.* at 28:21-29:2 (GLL App. 69).

RESPONSE: The CJR Respondents object to paragraph 17 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that split routing was one of many important aspects of GLL's operations during the period when Mr. Rosenberg was the Chief Executive Officer. The CJR Respondents show further that in 2003 the managers of GLL received legal advice from GLL's

maritime counsel regarding the practice of split routing. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3). The managers understood counsel's advice to indicate that the practice of split routing was legal but the practice of shortstopping was not. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3). Based on this advice, GLL terminated the practice of shortstopping. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3).

The CJR Respondents show further that Mr. Rosenberg was not actively involved in GLL's day-to-day operations during the period relevant to this lawsuit and did not directly participate in any routing decisions relevant to this case. (Rosenberg Dec., at ¶¶ 21-39) (CJR Exh. A) (CJR App., at pp. 4-7); (Briles Dec., at ¶¶ 47-48) (CJR Exh. B) (CJR App., at p. 9).

18. Every company Rosenberg had ever worked for did split routing. *Id.* at 40:12-13 (GLL App. 72).

RESPONSE: The CJR Respondents object to paragraph 18 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 18.

19. He first became familiar with the practice in 1994. *Id.* at 92:2-9 (GLL App. 81).

RESPONSE: The CJR Respondents object to paragraph 19 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 19.

20. Rosenberg provided incorrect information to steamship lines for their bills of lading and in Global Link's delivery orders when he was doing routing of shipments. *Id.* at 247:1-25 (GLL App. 87).

RESPONSE: The CJR Respondents object to paragraph 20 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that the practice of split routing involved providing incorrect information to the operations staff of certain steamship lines whose management approved of GLL doing so. However, the CJR Respondents show further that Mr. Rosenberg was not actively involved in GLL's day-to-day operations during the period relevant to this lawsuit, did not directly participate in any routing decisions relevant to this case, and did not provide incorrect information to MOL for any shipments at issue in this case. (Rosenberg Dec., at ¶¶ 21-39) (CJR Exh. A) (CJR App., at pp. 4-7); (Briles Dec., at ¶¶ 47-48) (CJR Exh. B) (CJR App., at p. 9). The CJR Respondents show further that, as GLL argues in its opposition to MOL's claims, MOL knew of and encouraged GLL to engage in the practice of split routing, including, necessarily, providing incorrect information regarding the final destinations of shipments. (Rosenberg Dec., at ¶¶ 36-52) (CJR Exh. A) (CJR App., at pp. 6-9); (Briles Dec., at ¶¶ 8-26) (CJR Exh. B) (CJR App., at pp. 14-16).

21. Rosenberg taught Jim Briles how to conduct split routings. *Id.* at 159:2-4 (GLL App. 84).

RESPONSE: The CJR Respondents object to paragraph 21 on the grounds that the deposition testimony of Mr. Rosenberg cited by GLL is inadmissible in this proceeding for the reasons set

forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that Mr. Rosenberg taught Mr. Briles about the practice of split routing.

22. Subsequently, Briles taught other staffers Global Link's routing strategies, including how to do split routings. James Briles Dep. at 55:13-15, 137:7-24, June 4, 2008, attached hereto as Exh. D (GLL App. 91, 96).

RESPONSE: The CJR Respondents object to paragraph 22 on the grounds that the deposition of James Briles in the Arbitration is not admissible in this proceeding. Mr. Briles's out-of-court statements at his deposition in the Arbitration are hearsay. Prior sworn testimony may be admissible as an exception to the hearsay rule *only when* the declarant is unavailable. *See* Fed. R. Evid. 804(b)(1); *see also Walker v Pepsi-Cola Bottling Co.*, Nos. Civ. A. 98-225-SLR, 99-748-JJF, 2000 WL 1251906, at *5 (D. Del. Aug. 10, 2000) (holding that transcript of "prior sworn testimony in an arbitration hearing" was "hearsay and not admissible . . . .").

To establish unavailability under 804(b)(1), the proponent of the hearsay statement must demonstrate that the declarant is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means. *See* Fed. R. Evid. 804(a)(5); *Williams v. United Diary Farmers*, 188 F.R.D. 266 (S.D. Ohio 1999). Thus the mere absence of the declarant from the hearing, alone, does not establish unavailability. *See id.*; Fed. R. Evid. 804(a)(5) Advisory Committee Notes. Rather, the proponent must also establish unavailability. *See id.* Reasonable efforts include service of a subpoena on the declarant to testify at the hearing, attempts to depose the declarant, or some other showing of a good faith effort to secure the declarant's attendance, such as witnesses explaining why the

declarant is unavailable to testify. *See id.* (rule designed primarily to require that an attempt be made to depose a witness, as well as to seek his attendance as a precondition to the witness being deemed unavailable); *Simulnet East Ass'n v. Ramada Hotel Operating, Co.*, Nos. 95-16339, 95-16340, 1997 WL 429153, at *6 (9th Cir. July 31, 1997) ("Where no attempt has been made to depose a witness, that witness cannot be said to be unavailable."); *Carlisle v. Frisbie Memorial Hosp.*, 888 A.2d 405 (N.H. 2005) (rejecting admissibility of deposition testimony because defendants did not adequately show that they could not procure the witness to testify).

GLL made no efforts to depose Mr. Briles in this proceeding despite GLL's ability to request a subpoena from the Commission to take Mr. Briles's deposition. GLL has thus failed to demonstrate that Mr. Briles is unavailable. Accordingly, his deposition is inadmissible.

Responding further, the CJR Respondents do not dispute that Mr. Briles taught Molly Jaworski about GLL's routing strategies, including split routings.

23. Rosenberg was copied on most of Global Link's communications in regard to routings. Rosenberg Dep. at 170:9-20, Exh. C (GLL App. 85).

RESPONSE: The CJR Respondents object to paragraph 23 on the grounds that the deposition testimony of Mr. Rosenberg cited is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Additionally, the testimony cited does not support GLL's proposed fact. Further, Mr. Rosenberg testified in his deposition that he was copied on certain emails *relating to Hecny*. *See* Rosenberg Dep. 169:9-20. Communications relating to Hecny have no bearing on whether Mr. Rosenberg was involved with or participated in any shipments with MOL which are at issue in this lawsuit. Rather, to the contrary, Mr. Rosenberg was not actively involved in GLL's day-to-day operations and did not directly

participate in routing decisions during the relevant period. (Rosenberg Dec., at ¶¶ 21-39) (CJR Exh. A) (CJR App., at pp. 4-7); (Briles Dec., at ¶¶ 47-48) (CJR Exh. B) (CJR App., at p. 9).

24. Even through 2006, up until the time the company was sold to current ownership, Rosenberg still received email related to routing issues and still communicated regularly with Gary Meyer, Global Link's Chief Financial Officer, and other staff at Global Link. *Id.* at 294:5-12 (GLL App. 88).

RESPONSE: The CJR Respondents object to paragraph 24 on the grounds that the deposition testimony of Mr. Rosenberg cited is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, while the CJR Respondents do not dispute that Mr. Rosenberg may have been copied on certain emails and may have communicated with employees of GLL, Mr. Rosenberg was not actively involved in GLL's day-to-day operations and did not directly participate in routing decisions during the relevant period. (Rosenberg Dec., at ¶¶ 21-39) (CJR Exh. A) (CJR App., at pp. 4-7); (Briles Dec., at ¶¶ 47-48) (CJR Exh. B) (CJR App., at p. 9).

25. During his tenure at Global Link, Rosenberg was the Qualifying Individual for the company's FMC license. *Id.* at 77:25-78:3 (GLL App. 78, 79) In his capacity as the Qualifying Individual for Global Link, Rosenberg never reviewed the Commission's rules and regulations. *Id.* at 81:19-25 (GLL App. 79).

RESPONSE: The CJR Respondents object to paragraph 25 on the grounds that the deposition testimony of Mr. Rosenberg cited is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do

not dispute that Mr. Rosenberg served as the qualifying individual for GLL. The CJR Respondents further do not dispute that at his deposition Mr. Rosenberg did not recall having reviewed the Commission's rules and regulations.

26. Rosenberg was unaware that the FMC has regulations prohibiting licensees from knowingly imparting false information relative to an ocean transportation transaction. *Id.* at 83:16-25 (GLL App. 80).

RESPONSE: The CJR Respondents object to paragraph 26 on the grounds that the deposition testimony of Mr. Rosenberg cited is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that at his deposition Mr. Rosenberg did not recall having reviewed the Commission's rules and regulations. Responding further, the CJR Respondents show that GLL sought and obtained legal advice relating to the practice of split routing after the 2003 sale. (Rosenberg Dec. at ¶ 10) (CJR Exh. A) (CJR App., at p. 3). When Mr. Rosenberg and the other managers at GLL received the legal advice, they understood it to mean that the practice of split routing was legal, but the practice of shortstopping may be illegal. (Rosenberg Dec. at ¶ 11) (CJR Exh. A) (CJR App. at p. 3); (Briles Dec., at ¶¶ 6-7) (CJR Exh. B) (CJR App., at pp. 13-14). Based on this advice, Mr. Rosenberg and the managers at GLL instructed GLL to stop the practice of shortstopping to the extent that it was occurring. (Rosenberg Dec. at ¶ 11) (CJR Exh. A) (CJR App., at p. 3).

27. The Arbitration Panel, after reviewing extensive documentation and following seven days of hearings, concluded that Rosenberg founded Global Link and brought with him

from former employment the practice of split-routing, which he refined and supervised before turning over the responsibility to subordinates. Arbitration Award at 33, Exh. B (GLL App. 36).

RESPONSE: The CJR Respondents dispute paragraph 27 and show that the Partial Final Award issued by the Arbitration Panel speaks for itself. The CJR Respondents refer the ALJ to the Partial Final Award for its full text.

Deposition of Jim Briles

28. Jim Briles was the Vice President of Trade & Operations at Global Link. *See* Jim Briles Dep. at 62:1-6, Exhibit D (GLL App. 93).

RESPONSE: The CJR Respondents object to paragraph 28 on the grounds that the deposition testimony of Mr. Briles is inadmissible for the reasons set forth in the CJR Respondents' response to paragraph 22. Responding further, the CJR Respondents do not dispute paragraph 28.

29. When Briles was hired by Global Link, the routing strategies were already established. *Id.* at 52:5-10 (GLL App. 90).

RESPONSE: The CJR Respondents object to paragraph 29 on the grounds that the deposition testimony of Mr. Briles is inadmissible for the reasons set forth in the CJR Respondents' response to paragraph 22. Responding further, the CJR Respondents do not dispute paragraph 29.

30. Split routing was incorporated into Global Link's standard operating procedures. *Id.* at 135:8-11 (GLL App. 96).

RESPONSE: The CJR Respondents object to paragraph 30 on the grounds that the deposition testimony of Mr. Briles is inadmissible for the reasons set forth in the CJR Respondents' response to paragraph 22. Responding further, the CJR Respondents do not dispute paragraph 30.

31. Rosenberg walked Briles through how Global Link routed transactions. *Id.* at 53:3-6 (GLL App. 90).

RESPONSE: The CJR Respondents object to paragraph 31 on the grounds that the deposition testimony of Mr. Briles is inadmissible for the reasons set forth in the CJR Respondents' response to paragraph 22. Responding further, the CJR Respondents do not dispute paragraph 31.

32. Rosenberg was always copied on routing communications for as long as Rosenberg was with the company. *Id.* at 58:9-17 (GLL App. 92).

RESPONSE: The CJR Respondents object to paragraph 32 on the grounds that the deposition testimony of Mr. Briles is inadmissible for the reasons set forth in the CJR Respondents' response to paragraph 22. The CJR Respondents further objec. to paragraph 32 to the extent it mischaracterizes Mr. Briles' deposition testimony. Mr. Briles' testimony related to communications *with or about Hecny*. Communications relating to Hecny have no bearing on whether Mr. Rosenberg was involved with or participated in any shipments with MOL which are at issue in this lawsuit. Mr. Briles also testified at his deposition that he "wouldn't say [Mr.

Rosenberg] was really ever heavily involved while I was there." (Briles Dep. at 58:13-22) (GLL App. 92).

33. Subsequently, Briles taught other staffers Global Link's routing strategies, including how to do split routings. Briles Dep. at 55:13-15, 137:7-24, Exh. D (GLL App. 91, 96).

RESPONSE: The CJR Respondents object to paragraph 33 on the grounds that the deposition testimony of Mr. Briles is inadmissible for the reasons set forth in the CJR Respondents' response to paragraph 22. Responding further, the CJR Respondents do not dispute that Mr. Briles taught Molly Jaworski about GLL's routing strategies, including split routings.

34. Briles communicated with Rosenberg and Gary Meyer as to whether split routing was legal. *Id.* at 140:10-143:24 (GLL 97-98).

RESPONSE: The CJR Respondents object to paragraph 34 on the grounds that the deposition testimony of Mr. Briles is inadmissible for the reasons set forth in the CJR Respondents' response to paragraph 22. Responding further, the CJR Respondents do not dispute that Mr. Briles communicated with Mr. Rosenberg and Gary Meyer as to whether split routing was legal. Based on those communications, Mr. Briles did not believe that split routing was illegal or improper. (Briles Dec., at ¶ 7) (CJR Exh. B) (CJR App., at pp. 13-14). Rather, Mr. Briles understood that GLL had received advice from counsel that the practice of split routing was legal as long as GLL was not shortstopping shipments. (Briles Dec., at ¶ 7) (CJR Exh. B) (CJR App., at pp. 13-14).

Respondent OGF

35. Respondent Olympus Growth Fund ("OGF") is a private equity investment fund organized as a Delaware limited partnership. *See* Olympus Respondents' Motion for Summary Judgment Statement of Uncontroverted Facts at ¶ 2, and supporting documentation attached as Exhibit E (GLL App. 106)

RESPONSE: The CJR Respondents do not dispute paragraph 35.

36. In May 2003, OGF purchased 74.51 percent of the shares in GLL Holdings, Inc. ("Holdings"), the company that owned Global Link. *Id.* at ¶ 3 (GLL App. 106).

RESPONSE: The CJR Respondents do not dispute paragraph 36.

37. OGF sold its interest in Holdings to Global Link's current owners pursuant to a stock purchase agreement dated May 20, 2006. *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 37.

38. The sale closed on June 7, 2006. Arbitration Award at 5, Exh B (GLL App. 8).

RESPONSE: The CJR Respondents do not dispute paragraph 38.

39. The current ownership purchased Global Link for $128.5 million. *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 39.

40. The sellers of the company received net proceeds of $108,439,961, of which the two Olympus Funds received $83.1 million. *Id.* at 14 (GLL App. 17).

RESPONSE: The CJR Respondents do not dispute paragraph 40.

Respondent OEF

41. Respondent Olympus Executive Fund ("OEF") also is a private equity investment fund organized as a Delaware limited partnership. Olympus Respondents' MSJ SoF at ¶ 4, Exh. E (GLL App. 106).

RESPONSE: The CJR Respondents do not dispute paragraph 41.

42. In May 2003, OEF purchased 0.49 percent of the shares in Holdings. *Id.* at ¶ 5 (GLL App. 106)

RESPONSE: The CJR Respondents do not dispute paragraph 42.

43. On June 7, 2006, OEF sold its minority interest in Holdings to GLL Sub Acquisition, Inc. under the May 20, 2006 stock purchase agreement. *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 43.

44. The practice of split routing existed before OGF and OEF invested in Global Link and continued after they purchased the company. Arbitration Award at 15, 33, Exh. B (GLL App. 18, 36).

RESPONSE: The CJR Respondents do not dispute paragraph 44.

Respondents Heffernan, Cardenas and Louis Mischianti

45. Louis Mischianti, Keith Heffernan and David Cardenas were all principals of Olympus Partners and were officers or directors (or both) of Global Link. Arbitration Award at

3, Exh. B (GLL App. 6); *see also* Keith Heffernan Dep. at 131:8-23, July 31, 2008, attached as Exhibit F (GLL App. 128) (Heffernan, Cardenas and Mischianti were directors of Global Link.)

RESPONSE: The CJR Respondents object to paragraph 45 on the grounds that Mr. Heffernan's deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 45.

46. Heffernan and Cardenas were officers of Olympus. Keith Heffernan Dep. at 131:20-23), Exh. F (GLL App. 128).

RESPONSE: The CJR Respondents object to paragraph 46 on the grounds that Mr. Heffernan's deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 46.

Olympus Respondents Knowledge of and Participation in Split Routing
Testimony of David Cardenas

47. David Cardenas, one of the Olympus Respondents, was a director and officer of Global Link during the relevant time period. *See* David Cardenas Dep. at 44:13-15, August 6, 2008, Exh. G (GLL App. 147).

RESPONSE: The CJR Respondents object to paragraph 47 on the grounds that Mr. Cardenas' deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 47.

48. Beginning in 2003, Cardenas had a practice of communicating with the management at Global Link on a regular basis in person, by phone and by email. *Id.* at 54:17-55:6 (GLL App. 148).

RESPONSE: The CJR Respondents object to paragraph 48 on the grounds that Mr. Cardenas' deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 48.

49. Cardenas and Keith Heffernan had weekly phone calls with management. *Id* at 165:12-17 (GLL App. 156).

RESPONSE: The CJR Respondents object to paragraph 49 on the grounds that Mr. Cardenas' deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 49.

50. Cardenas traveled to Hong Kong and south China with the Global Link management team to meet with Global Link's customers and vendors, including representatives of Hecny. *Id.* at 188:17-23 (GLL App. 157); *see also*, Eric Joiner Dep. at 102:1-23, October 10, 2008, Exhibit 11 (GLL App. 161) (discussing Cardenas meeting with P&O in Hong Kong about getting container space and being treated as a preferential customer during customer peak season).

RESPONSE: The CJR Respondents object to paragraph 50 on the grounds that Mr. Cardenas' deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. The CJR Respondents further object to paragraph 50 on the grounds that Mr. Joiner's deposition is inadmissible in this proceeding for the same reason that Mr. Briles'

deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 50.

51. Hecny was Global Link's partner in Asia and the parties performed services for each other at origin and destination for shipments to the United States under both Hecny and Global Link service contracts. Arbitration Award at 6, Exh. B (GLL App. 9).

RESPONSE: The CJR Respondents do not dispute paragraph 51.

52. At Olympus, Cardenas developed expertise in logistics and the transportation industry, along with Keith Heffernan and Louis Mischianti. Cardenas Dep. at 66:4-67:5, Exh. G (GLL App. 149).

RESPONSE: The CJR Respondents object to paragraph 52 on the grounds that Mr. Cardenas' deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 52.

53. Cardenas was actively involved, along with Chad Rosenberg in identifying and recruiting Global Link's management team. *Id.* at 94:10-95:22 (GLL App. 150).

RESPONSE: The CJR Respondents object to paragraph 53 on the grounds that Mr. Cardenas' deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 53.

54. One of the employees that Cardenas hired, Eric Joiner, Global Link's Chief Operating Officer, brought to the Global Link Board of Director's attention, and Cardenas'

attention personally, a number of regulatory and operational issues with the company, including differences between where containers were being booked as opposed to where they were being delivered, *i.e.*, split routing. *Id.* at 96:12-97:10 (GLL App. 150).

RESPONSE: The CJR Respondents object to paragraph 54 on the grounds that Mr. Cardenas' deposition is inadmissible in this proceeding for the same reason that Mr. Rosenberg's deposition is inadmissible. Responding further, the CJR Respondents do not dispute paragraph 54. The CJR Respondents show further that after these issues were brought to the Board's attention, GLL sought and obtained legal advice relating to the practice of split routing. (Rosenberg Dec., at ¶ 10) (CJR Exh. A) (CJR App., at p. 3). When Mr. Rosenberg and the other managers at GLL received the legal advice, they understood it to mean that the practice of split routing was legal, but the practice of shortstopping may be illegal. (Rosenberg Dec., at ¶ 11) (CJR Exh. A) (CJR App., at p. 3); (Briles Dec., at ¶¶ 6-7) (CJR Exh. B) (CJR App., at pp. 13-14). Based on this advice, Mr. Rosenberg and the managers at GLL instructed GLL to stop the practice of shortstopping to the extent that it was occurring. (Rosenberg Dec., at ¶ 11) (CJR Exh. A) (CJR App., at p. 3). Thus, the managers at GLL believed that the practice of split-routing was both legal and common place. (Briles Dec., at ¶¶ 6-7) (CJR Exh. B) (CJR App., at pp. 13-14); (Rosenberg Dec., at ¶¶ 5, 10-11) (CJR Exh. A) (CJR App. at pp. 2-3).

55. Shortly thereafter, Eric Joiner was terminated by the Board. *Id.* at 117:3:15 (GLL App. 151); *see also* Keith Heffernan Dep. at 136:16-24, Exh. F (GLL App. 130) ("I don't remember if he was fired *per se*; he was terminated.")

RESPONSE: The CJR Respondents object to paragraph 55 on the grounds that Mr. Cardenas' and Mr. Heffernan's depositions are inadmissible in this proceeding for the reasons set forth

above. Responding further, the CJR Respondents do not dispute paragraph 55. The CJR Respondents show further that there is no evidence that the termination of Mr. Joiner's employment with GLL had anything to do with his having brought the issue of split routing to the Board's attention.

56. Cardenas and Heffernan had a phone call with Chad Rosenberg, Eric Joiner and Gary Meyer to discuss split routing in the summer of 2003. Cardenas Dep. at 116:2-12, 122:3-4, Exh. G (GLL App. 151, 152).

RESPONSE: The CJR Respondents object to paragraph 56 on the grounds that Mr. Cardenas' deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 56.

57. The Global Link management team informed him that there was a question about whether it was appropriate to deliver containers to destinations other than where they were booked. *Id.* at 154:3-9 (GLL App. 154).

RESPONSE: The CJR Respondents object to paragraph 57 on the grounds that Mr. Cardenas' deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 57.

58. Cardenas did not indicate to Global Link management that he had a concern about the split routing practice that was described. *Id.* at 157:12-158:20 (GLL App. 154-155).

RESPONSE: The CJR Respondents object to paragraph 58 on the grounds that Mr. Cardenas' deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 58.

59. He also did not suggest that they get a second opinion as to whether split routing was legal or suggest taking any other steps in that regard. *Id* at 158:3-8 (GLL App. 155).

RESPONSE: The CJR Respondents object to paragraph 59 on the grounds that Mr. Cardenas' deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 59.

60. As best as he can recall, Cardenas never followed up on the issue with anyone else. *Id* at 158. 162:17-163:6 (GLL App. 155, 156).

RESPONSE: The CJR Respondents object to paragraph 60 on the grounds that Mr. Cardenas' deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 60. The CJR Respondents show further that GLL sought and obtained legal advice relating to the practice of split routing, and that the management of GLL understood that advice to mean that the practice of split routing was legal, but the practice of shortstopping may be illegal. (Rosenberg Dec., at ¶¶ 10, 11) (CJR Exh. A) (CJR App., at p. 3); (Briles Dec., at ¶¶ 6-7) (CJR Exh. B) (CJR App., at pp. 13-14).

61. Mr. Cardenas testified that even if management knew split routing was contrary to FMC regulations, he would not necessarily have wanted them to tell him. *Id.* at 161:2-23 (GLL App. 155).

RESPONSE: The CJR Respondents object to paragraph 61 on the grounds that Mr. Cardenas' deposition is inadmissible for the reasons set forth above.

62. Although Cardenas testified that at the time he was not shown the legal opinion from counsel -- which stated that "the practice of changing destinations without notice to the ocean carrier exposes Global Link to possible Shipping Act violations" -- such an opinion would not have surprised him. *Id.* at 235:2-13 (GLL App. 159).

RESPONSE: The CJR Respondents object to paragraph 62 on the grounds that Mr. Cardenas' deposition is inadmissible for the reasons set forth above.

Testimony of Keith Heffernan

63. Heffernan and Cardenas were both involved with Global Link from the time of Olympus' purchase of the company in 2003 until its sale to current ownership in 2006. Heffernan Dep. at 153:8-15, Exh. F (GLL App. 133) ("We were both involved from beginning to end.")

RESPONSE: The CJR Respondents object to paragraph 63 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 63.

64. Heffernan regularly communicated with all the members of Global Link's senior management team. *Id.* at 135:18-136:11 (GLL 129-130).

RESPONSE: The CJR Respondents object to paragraph 64 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 64.

65. Heffernan and Cardenas received weekly flash reports from Global Link, as well as monthly financial statements. *Id.* at 138:5-25 (GLL App. 131).

RESPONSE: The CJR Respondents object to paragraph 65 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 65.

66. Heffernan and Cardenas played a role in doing due diligence on IT systems, like a "track and trace system" in regard to shipments, which helped Global Link keep track of where containers were in the course of their shipment. *Id.* at 151:8-12, 295:2-21 (GLL App. 132, 145).

RESPONSE: The CJR Respondents object to paragraph 66 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 66.

67. Heffernan learned that Global Link was handling shipments for which the final destination of the container was different than how it was booked with the steamship line in the summer or fall of 2003, shortly after Olympus acquired Global Link. *Id.* at 88:2-25, 92:2-9, 188:14-189:10 (GLL App. 124, 126, 140-41). Either Eric Joiner or Gary Meyer brought it to Olympus's attention. *Id.* at 89:7-12 (GLL App. 125).

RESPONSE: The CJR Respondents object to paragraph 67 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 67.

68. Heffernan was aware that management consulted with an attorney in regard to the practice. *Id.* at 93:2-25 (GLL App. 127). Heffernan had consulted with Global Link's attorneys on compliance issues, including C-TPAT. *Id.* at 156:3-25 (GLL App. 134).

RESPONSE: The CJR Respondents object to paragraph 68 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 68.

69. When asked whether as a director of Global Link in 2003 he wanted to know if there was a company practice that was exposing Global Link to possible Shipping Act violations, Heffernan stated that that he was not sure that is something he would have wanted to know or something that would have been important to him. *Id* at 171:18-172:2 (GLL App. 135).

RESPONSE: The CJR Respondents object to paragraph 69 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above.

70. Heffernan admitted that he did not necessarily want to know that the FMC had "gone after" an entity for having cargo dropped off at a destination different than what was reflected on the bill of lading. *Id.* at 174:3-176:6 (GLL App. 137-139)

RESPONSE: The CJR Respondents object to paragraph 70 on the grounds that Mr. Heffernan's deposition is inadmissible for the reasons set forth above.

Testimony of Chad Rosenberg in Regard to the Olympus Respondents

71. Chad Rosenberg, the founder of Global Link, testified that he had a telephone conversation with Keith Heffernan and David Cardenas around July of 2003, after they had received a call from Eric Joiner, who had raised questions about split routing. *See* Chad Rosenberg Dep. at 32:3-34:12, Exh. C (GLL App. 70-71).

RESPONSE: The CJR Respondents object to paragraph 71 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 71.

72. Heffernan and Cardenas called Mr. Rosenberg to discuss split routing and asked him to walk them through a specific example of split routing, which he did. *Id.* at 34:10-23 (GLL App. 71). As a result of the call, Heffernan and Cardenas understood how the process worked. *Id.* at 34:24-36:20 (GLL App. 71).

RESPONSE: The CJR Respondents object to paragraph 72 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that Mr. Rosenberg discussed the process of split routing with Mr. Heffernan and Mr. Cardenas.

73. Mr. Rosenberg recalls that they were going to follow up on the matter with Eric Joiner and dig deeper into the issue. *Id.* at 40:19-41:8 (GLL App. 72).

RESPONSE: The CJR Respondents object to paragraph 73 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR

Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that Mr. Rosenberg discussed with Mr. Cardenas and Mr. Heffernan that there would be follow up after their conversation. The CJR Respondents show further that GLL then sought and received legal advice from GLL's maritime counsel regarding the practice of split routing. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3). The managers understood counsel's advice to indicate that the practice of split routing was legal but the practice of shortstopping was not. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3); (Briles Dec., at ¶¶ 6-7) (CJR Exh. B) (CJR App., at pp. 13-14). Based on this advice, GLL terminated the practice of shortstopping. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3).

74. After consulting with a maritime attorney, Mr. Rosenberg testified he had another telephone call with Keith Heffernan and David Cardenas to discuss split routing. *Id.* at 43:1-44:1 (GLL App. 73).

RESPONSE: The CJR Respondents object to paragraph 74 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 74.

75. Rosenberg does not recall Heffernan or Cardenas ever asking him for emails or other communications from the lawyer addressing the legality of split routing. *Id.* at 44:18-45:4 (GLL App. 73).

RESPONSE: The CJR Respondents object to paragraph 75 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR

Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 75.

76. Rosenberg testified that no effort was made to hide split routing from Olympus. *Id.* at 48:19-25 (GLL App. 74).

RESPONSE: The CJR Respondents object to paragraph 76 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 76.

77. Heffernan and Cardenas knew that the alternative to split routing was to renegotiate new door points to a contract because Rosenberg explained it to them. *Id.* at 49:1-18 (GLL App. 74).

RESPONSE: The CJR Respondents object to paragraph 77 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that Mr. Rosenberg discussed with Mr. Cardenas and Mr. Heffernan that an alternative to split routing was to renegotiate door points. The CJR Respondents show further that with respect to MOL, however, such an alternative was not available. More specifically, GLL requested additional door points from MOL on several occasions and Rebecca Yang, a sales representative at MOL, encouraged GLL to book shipments to the regional points that had already been negotiated in the service contract, rather than to request additional points. (Briles Dec., at ¶¶ 19-25) (CJR Exh. B) (CJR App., at pp. 15-16). Further, Paul McClintock, a Vice President of Sales

at MOL, and Ms. Yang, told Mr. Rosenberg that MOL preferred that GLL engage in split routing because the use of regional points saved MOL from the inconvenience and burden of having to negotiate numerous additional door points. (Rosenberg Dec., at ¶¶ 47-51) (CJR Exh. A) (CJR App., at p. 8). In fact, Ms. Yang encouraged GLL to do split moves, as she told Mr. Rosenberg that it was more convenient for her and MOL if GLL engaged in split routing. (Rosenberg Dec., at ¶ 51) (CJR Exh. A) (CJR App,. at p. 8).

Indeed, the Panel in the Arbitration found MOL knew of and encouraged the practice of split routing: "As for the carriers' knowledge, there is clear evidence that a senior sales representative of Mitsui knew that Global Link was engaged ir split routing, and Mitsui did not object—indeed, Mitsui encouraged continuation of the practice—because Mitsui preferred not to be bothered with negotiating a multiplicity of door points." (Partial Final Award, at p. 10) (MOL Exh. A) (MOL App., at p. 10). GLL is bound by this finding: "As noted above, the Commercial Arbitration Tribunal found 'clear evidence' that Mitsui knew of, condoned, endorsed, and encouraged Global Link's practice of split-routing. Under collateral estoppel, Global Link may not relitigate this issue of fact. As a result of Global Link's vo untary initiation and participation in the arbitration, Global Link is now bound by this factual finding. The fact that the practice was open, known, acknowledged, endorsed and encouraged by Mitsui defeats Global Link's cross-claims under 10(a)(1) given, that as noted above, that bad faith or deceit/concealment are essential elements of an 'unjust or unfair device or means' pursuant to Commission regulation, 46 C.F.R. § 545.2." *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., et al.*, FMC No. 09-01 (FMC Aug. 1, 2011) (Order Denying Appeal Of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Vic lations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motion to Dismiss) (Commissioner Khouri,

concurring in part and dissenting in part) (discussing reasons for adherence to doctrines of res judicata and collateral estoppel).

78. Heffernan attended a board meeting in 2005 at which the issue of Maersk making split routing more difficult was addressed. *Id.* at 50:24-51:24 (GLL App. 75).

RESPONSE: The CJR Respondents object to paragraph 78 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute that the issue of preferred trucking with Maersk was discussed at a board meeting.

79. Cardenas and Heffernan hired Eric Joiner to the Chief Operations Officer at Global Link. *Id.* at 72:4-21 (GLL App. 77).

RESPONSE: The CJR Respondents object to paragraph 79 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth in the CJR Respondents' response to paragraph 6. Responding further, the CJR Respondents do not dispute paragraph 79.

Testimony of Eric Joiner

80. As reflected above, Cardenas hired Eric Joiner as Global Link's Chief Operating Officer. Joiner testified that when he learned of the split routing, he believed it was illegal. *See* Eric Joiner Dep. at 191:2-4, Exh H (GLL App. 162).

RESPONSE: The CJR Respondents object to paragraph 80 on the grounds that Mr. Joiner's deposition is inadmissible for the same reasons that Mr. Briles' deposition is inadmissible. The

CJR Respondents further object to paragraph 80 on the grounds that the Panel in the Arbitration found that Mr. Joiner's testimony was not credible. (Partial Final Award, at p. 35) (MOL Exh. A) (MOL App., at p. 35) ("...the Panel does not credit Mr. Joiner, who was fired after less than a year and who appears to have offered himself as a consultant to both sides for compensation").

Responding further, the CJR Respondents do not dispute that Mr. Cardenas hired Mr. Joiner. The CJR Respondents also do not dispute that Mr. Joiner testified that when he learned of the split routing, he believed it was illegal. However, Mr. Joiner's testimony is completely contradicted by an email Mr. Joiner sent in 2003. (MOL Exh. BL) (MOL App., at p. 1624). In this email string, GLL's managers had sought advice from counsel regarding the legality of split-routing. In reviewing the advice and commenting on it to GLL's other managers, Mr. Joiner stated: "My read of this is that it's OK to have a trucker carry goods beyond termination of the ocean carrier BL, either inland or at a port and to compensate the trucker for the additional carriage. However we cant short stop the container and get paid the difference." (MOL Ex. BL) (MOL. App., at p. 1624)

Mr. Joiner's statement in this e-mail thus contradicts his testimony that he believed split routing was illegal. Indeed, Mr. Joiner's statement in this e-mail is consistent with Mr. Rosenberg's testimony that after receiving advice from legal counsel, the managers of GLL believed that split-routing was legal but that short-stopping was not. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3); (Briles Dec., at ¶¶ 6-7) (CJR Exh. B) (CJR App., at pp. 13-14). This contemporaneous email constitutes the best evidence of what Mr. Joiner actually believed at the time and indicates that to the extent Mr. Joiner testified that he believed split routing was illegal when he learned of it, his testimony should not be credited.

81. Joiner testified that Global Link's counsel confirmed the practice was illegal and that Joiner not only told that to Global Link's management at the time, he also told Olympus the practice was illegal.

Q. Did you have conversations with anyone at Olympus about the practice's legality?

A. Yes.

Q. Who did you have those conversations with?

A. Dave Cardenas.

Id. at 191:12-17, Exh. I (GLL App. 162).

RESPONSE: The CJR Respondents incorporate their objections and response to paragraph 80 herein.

82. Joiner testified that he told Cardenas that Global Link was not complying with the Shipping Act and that it was a serious regulatory issue. *Id.* at 193:3-13, 196:6-18 (GLL App. 162, 163).

RESPONSE: The CJR Respondents incorporate their objections and response to paragraph 80 herein.

83. One of the reasons Joiner had that discussion with Cardenas was that he wanted to have a lawyer make a presentation to Global Link on compliance with the Shipping Act for training purposes and Cardenas needed to authorize such an expenditure. *Id.* at 198:1-10 (GLL App. 164).

RESPONSE: The CJR Respondents incorporate their objections and response to paragraph 80 herein. The CJR Respondents show further that GLL's maritime counsel, Neal Mayer, gave a

presentation to GLL on compliance with the Shipping Act in August of 2003. (Partial Final Award, at p. 18) (MOL Exh. A) (MOL App., at p. 18).

84. Joiner believed that such training would mitigate the FMC's likelihood of imposing significant monetary damages if it discovered Global Link's ongoing split routing practices. *Id.* at 198:11-199:3 (GLL App. 164).

RESPONSE: The CJR Respondents incorporate their objections and response to paragraph 80 herein.

85. Despite Joiner's statements to Cardenas, the split routing practices at Global Link continued. *Id.* at 196:19-22 (GLL App. 163).

RESPONSE: The CJR Respondents incorporate their objections and response to paragraph 80 herein. Responding further, the CJR Respondents do not dispute that the split routing practice at GLL continued. After seeking and receiving the advice of legal counsel, all of the managers at GLL, including Mr. Joiner, believed that the practice of split routing was legal but the practice of shortstopping was illegal. (Rosenberg Dec., at ¶¶ 10-11) (CJR Exh. A) (CJR App., at p. 3); (Briles Dec., at ¶¶ 6-7) (CJR Exh. B) (CJR App., at pp. 13-14).

The Olympus Respondents Admissions as Part of Its Statement of Uncontroverted Facts in Support of Summary Judgment Motion

86. Respondent Louis J. Mischianti served as a board director of Holdings and Global Link from May 2003 until June 2006. Olympus Respondents' Statement of Uncontroverted Facts at ¶ 11, Exh. E (GLL App. 107).

RESPONSE: The CJR Respondents do not dispute paragraph 86.

87. Respondent David Cardenas served as a board director and officer of Holdings and Global Link from May 2003 until June 2006. *Id.* at ¶ 13 (GLL App. 108).

RESPONSE: The CJR Respondents do not dispute paragraph 87.

88. Respondent Keith Heffernan served as a board director and officer of Holdings and Global Link from May 2003 until June 2006. *Id.* at ¶ 16 (GLL App. 108).

RESPONSE: The CJR Respondents do not dispute paragraph 88.

89. Cardenas and Heffernan learned about Global Link's split-routing practices after OGF and OEF acquired their interests in Holdings. *Id.* at ¶ 19 (GLL App. 109).

RESPONSE: The CJR Respondents do not dispute paragraph 89.

90. Mr. Cardenas was first advised about Global Link's split-routing practices in a brief telephone conversation with Global Link management in the summer of 2003. *Id.* at ¶ 20 (GLL App. 109).

RESPONSE: The CJR Respondents do not dispute paragraph 90.

91. Rosenberg, Global Link's founder and then-President, explained split routing to Cardenas and Heffernan. *Id* at ¶ 19 (GLL App. 109).

RESPONSE: The CJR Respondents do not dispute paragraph 91.

Global Link's Current Ownership and Management

92. In June, 2006, Global Link was acquired by its current owner, Golden Gate Logistics, LLC ("Golden Gate"). *See* August 1, 2011 Commission Order, Docket No. 09-01 (91) at 33 n.4.

RESPONSE: The CJR Respondents do not dispute paragraph 92.

93. Shortly after Golden Gate acquired Global Link, the company was informed by a former employee that she had been fired due to her refusal to engage in split routing or split deliveries whereby shipments from Asia would be delivered to inland locations in the United States that were not those reflected on the master bill of lading and not destinations specified in service contract with the steamship line. Arbitration Award at 14, Exh. B (GLL App. 17).

RESPONSE: The CJR Respondents do not dispute that after Golden Gate acquired Global Link, Eileen Cakmur informed managers of Golden Gate that she had been fired from GLL.

94. When Global Link's current management learned of the practice of split routing, in July of 2006, through this former employee, it conducted an investigation and contacted maritime counsel. *Id* at 14-15 (GLL App. 17-18). It took Global Link until early 2007 to ascertain the extent of the practice. *Id* at 15 (GLL App. 18)

RESPONSE: The CJR Respondents do not dispute that GLL continued the practice of split-routing into the middle of 2007 despite supposedly coming to the belief in the middle of 2006 that the practice was illegal. The CJR Respondents dispute any suggestion by GLL that it would have been impractical for the owners of GLL to end split routing sooner than they did. As soon as GLL received advice from counsel after the 2006 sale regarding the legality of split-routing,

GLL was on notice that it could face claims like those asserted against by MOL in this proceeding. Despite this knowledge, GLL did not end the practice of split routing for another year. There is no evidence demonstrating that GLL acted in a reasonable fashion in waiting for a year to end the practice of split routing. Indeed, statements in the Partial Final Award confirm that the Arbitration Panel had doubts about the timing of GLL's termination of split routing and whether it was driven by the Arbitration Claimants' litigation strategy: "In assessing Claimants' position in this matter, a few points bear noting. First, not only did Meyer, Briles and the other members of Global Link management team who had allegedly deceived GTCR in the negotiations remain in the employ of the new Company; there is no evidence in the record that they were disciplined or chastised. Second, there is no mention of split-routing as being illegal or otherwise in the post-acquisition Board minutes of Global Link Logistics or GTCR's periodic reports to its investors or bank lenders. . . . Finally, Claimants did not self-report to the FMC until May 21, 2008 ...-- nearly two months after learning of split-routing practice. Rocheleau testified that it took 'some time' to quantify the extent of split-routing, but that fact does not explain the delay of a further year or more in notifying the FMC...." (Partial Final Award, at p. 15) (MOL Exh. A) (MOL App., at p. 15).

95. Upon advice of counsel, when Global Link's existing contracts with shippers expired, in May of 2007, it renegotiated the contracts so as to eliminate the possibility of split routing. *Id.* Global Link later self-reported the split routing practices to the FMC. *Id*

RESPONSE: The CJR Respondents incorporate their response to paragraph 94 herein. The CJR Respondents do not dispute that GLL self-reported the practice of split routing to the FMC.

Arbitration Panel Findings

96. The Arbitration Panel made findings holding the Rosenberg and Olympus Respondents liable for their failure to disclose split routing practices to current ownership of Global Link. Arbitration Award at 38 (GLL App. 41). The Panel also found that they made a material misrepresentation to Global Link's current owner in asserting that Global Link was in compliance with the rules and regulations of the Federal Maritime Commission and the Shipping Act. *Id.* at 39, 42 (GLL App. 42, 45).

RESPONSE: The CJR Respondents dispute paragraph 96. The CJR Respondents refer the ALJ to the full text of the Arbitration Award, which speaks for itself. Responding further, the Arbitration Panel held CJRWE and the Olympus entities vicariously liable for the failure by the members of GLL's management team to disclose the practice of split routing in the due diligence leading up to the 2006 sale. That is, the Arbitration Panel found them liable by virtue of the conduct of others, rather than their own.

The Arbitration Panel also did not find that the CJR Respondents and Olympus Respondents made a material misrepresentation regarding GLL's legal compliance, contrary to GLL's assertion in paragraph 96. Rather, relying on the fact that in 2003 Mr. Rosenberg and others had sought and received advice regarding the legality of split routing and they attempted to follow the advice they received, the Arbitration Panel found that the Claimants did not carry their burden to show that the sellers of GLL knew that the practice of split routing was illegal. Thus, while the Panel concluded that the sellers had breached the representation regarding GLL's legal compliance, the Panel rejected the Claimants' arguments that the representation was a fraudulent misrepresentation. (Partial Final Award, at pp. 16, 20-21) (MOL Exh. A) (MOL App., at pp. 16, 20-21). GLL is estopped from relitigating this issue. *See, e.g., Cotton*

States Mutual Ins. Co v. Anderson, 749 F.2d 663, 666 (11th Cir, 1984) (finding collateral estoppel appropriate when "the issue in the subsequent proceeding is identical to the one involved in the prior action, the issue was actually litigated, and the determination of tissue was necessary in the prior action").

97. The Arbitration Panel found that Chad Rosenberg, David Cardenas and Keith Heffernan fraudulently omitted to disclose the Company's reliance on split-routing, and made a deliberate effort to keep the purchasers of Global Link from learning of the existence, extent and significance of the split-routing practices during the due diligence process. *Id.* at 23 (GLL App. 26).

RESPONSE: The CJR Respondents dispute paragraph 97. The CJR Respondents refer the ALJ to the full text and context of the Arbitration Award, which speaks for itself. Responding further, the CJR Respondents incorporate their response to paragraph 96 herein.

98. The Arbitration panel found that Keith Heffernan, who was responsible for gathering and passing along information to Global Link purchaser's agent, deleted a reference in a Confidential Information Memorandum which might have led Global Link's current management to be aware of split routing practices. *Id.* at 23-24 (GLL App. 26-27).

RESPONSE: The CJR Respondents dispute paragraph 98 and refer the ALJ to the full text of the Arbitration Award, which speaks for itself.

99. The Panel concluded that the motivation to conceal Global Link's reliance on split-routing was not difficult to identify, as the Olympus Respondents were eager to turn a profit

on their three-year old investment in Global Link by reselling the Company and Chad Rosenberg stood to reap an additional $20 million (in addition to $80 million already obtained) by reselling the Company to current Global Link ownership. *Id.* at 25 (GLL App. 28).

RESPONSE: The CJR Respondents dispute paragraph 99 and refer the ALJ to the full text of the Arbitration Award, which speaks for itself. The CJR Respondents show further that Mr. Rosenberg did not receive $80 million from the sale of GLL to Olympus in 2003; rather, Mr. Rosenberg received approximately $20 million. (Partial Final Award, at p. 3 n.1) (MOL Exh. A) (MOL App., at p. 3).

100. The Panel further concluded that disclosure of split routing by Olympus and Rosenberg would have generated questions about the legality, business prudence and sustainability of the split routing practices. *Id.* at 26 (GLL App. 29).

RESPONSE: The CJR Respondents dispute paragraph 100 and refer the ALJ to the full text of the Arbitration Award, which speaks for itself.

101. Split routing was discussed at a Board meeting in November of 2005, Arbitration Award at 35 (GLL App. 38); *see also* Chad Rosenberg Dep. at 50:24-51:12, Exh. C (GLL App. 75) (issue of split door moves with Maersk addressed at 2005 Board meeting).

RESPONSE: The CJR Respondents object to paragraph 101 on the grounds that Mr. Rosenberg's deposition is inadmissible in this proceeding for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 101.

102. The Arbitration Panel affixed direct liability on the Olympus Respondents and CJR as shareholders. Arbitration Award at 38 (GLL App. 41).

RESPONSE: The CJR Respondents deny paragraph 102 and refer to the full text of the Arbitration Award, which speaks for itself. The CJR Respondents show further that paragraph 102 misstates the Panel's findings. The Panel stated, "We are not affixing direct liability on the Olympus respondents as CJR Enterprises as shareholders . . .by piercing Global Link's corporate veil." (Partial Final Award, at p. 38) (MOL Exh. A) (MOL App., at p. 38). Rather, the Panel imposed vicarious liability on Olympus and CJRWE based on its finding that GLL's management team had made fraudulent omissions. (Partial Final Award, at p. 38) (MOL Exh. A) (MOL App., at p. 38).

103. This finding of direct liability of the Olympus Respondents and CJR was not predicated upon piercing the corporate veil; instead the Panel found the two Olympus and CJR World Respondents liable "under established agency law as principals on whose behalf and whose request Global Link management made fraudulently inadequate disclosures that were found to have been fraudulently inadequate." *Id.*

RESPONSE: The CJR Respondents deny paragraph 103 and refer the ALJ to the full text of the Arbitration Award, which speaks for itself. The CJR Respondents also incorporate their response to paragraph 102 herein.

104. The Panel also squarely addressed the relative culpability of the current owner of Global Link, and of the Rosenberg and Olympus Respondents. The Rosenberg and Olympus Respondents asserted that Global Link, under the doctrine of *in pari delicto*, should be precluded from asserting a claim against them due to the failure to immediately terminate split routing when it purchased the company in June of 2006. *Id.* at 45-46 (GLL App. 48-49). In rejecting

that defense, the Panel recognized that in order for the doctrine to apply, the plaintiff must be an active, voluntary participant in the unlawful activity that is the subject of the suit and no such showing could be made under the evidence in the record. *Id.* at 46 (GLL App. 49).

> Claimants [Global Link's current owner] unknowingly inherited a practice, which they continued until it was feasible to end the practice across the board, as they were advised by counsel would be a reasonable course. It is a stretch to call Claimants' continuation of split-routing until the next ocean carrier contract reset "voluntary," and to the extent Claimants may be considered culpable, their culpability does not rise to that of the Respondents who defrauded them.

Id. at 46 (GLL App. 49), citation omitted.

RESPONSE: The CJR Respondents dispute paragraph 104. The CJR Respondents refer the ALJ to the full text of the Arbitration Award, which speaks for itself. Furthermore, the statements in the Partial Final Award cited in paragraph 104 demonstrate that the Panel did not believe GLL was not culpable, just that it was less culpable than the Respondents. The Panel did not find that GLL's continuation of split-routing for a year after learning that such a practice was illegal was reasonable. Furthermore, other statements in the Partial Final Award confirm that the Arbitration Panel had doubts about the timing of GLL's termination of split routing and whether it was driven by the Claimants' litigation strategy: "In assessing Claimants' position in this matter, a few points bear noting. First, not only did Meyer, Brules and the other members of Global Link management team who had allegedly deceived GTCR in the negotiations remain in the employ of the new Company; there is no evidence in the record that they were disciplined or chastised. Second, there is no mention of split-routing as being illegal or otherwise in the post-acquisition Board minutes of Global Link Logistics or GTCR's periodic reports to its investors or bank lenders. . . . Finally, Claimants did not self-report to the FMC until May 21, 2008 ...--nearly two months after learning of split-routing practice. Rocheleau testified that it took 'some time' to quantify the extent of split-routing, but that fact does not explain the delay of a further

year or more in notifying the FMC...." (Partial Final Award, at p. 15) (MOL Exh. A) (MOL App., at p. 15).

Current Global Link Owners Attempt to End Split Routing
Ownership and Efforts to Terminate Split Routing

105. In June of 2006, Global Link was acquired by its current owner, Golden Gate Logistics, LLC ("Golden Gate"). *See* August 1, 2011 Commission Order, Docket No. 09-01 (91), 33 n.4; *see also* Williford Declaration ¶ 2, February 21, 2013, attached as Exhibit I (GLL App. 165). After Golden Gate acquired the company, a former employee made a complaint alleging questionable routing practices. Williford Dec. ¶ 4, Exh. I (GLL App. 165).

RESPONSE: The CJR Respondents do not dispute paragraph 105.

106. As a result, Golden Gate asked Gary Meyer, the President of Global Link, and James Briles, Global Link's Vice President of Transportation, to investigate the issue. *Id.* at ¶ 5 (GLL App. 165).

RESPONSE: The CJR Respondents do not dispute paragraph 106.

107. Initially, the allegations of questionable routing practices were not viewed as significant. *Id.* at ¶ 5. Global Link was unable to quantify the extent of the split routing practice until early 2007. Arbitration Award at 15 (GLL App. 18). Over the course of time, however, Global Link learned of the seriousness of the split routing practices at issue and the fact that they constituted violations of Federal Maritime Commission regulations. Williford Declaration ¶ 6, Exh. I (GLL App. 165).

RESPONSE: The CJR Respondents dispute paragraph 107. GLL received advice from maritime counsel shortly after the 2006 sale regarding the legality of split-routing. (Partial Final Award, at p. 14) (MOL Exh. A) (MOL App., at p. 14). At that point, GLL was on notice "of the seriousness of the split routing practices at issue and the fact that [in that lawyer's opinion] they constituted violations of Federal Maritime Commission regulations", as well as that it could face claims like those asserted against by MOL in this proceeding. Despite this knowledge, GLL did not end the practice of split routing for another year. There is no evidence demonstrating that GLL acted in a reasonable fashion in waiting for a year to end the practice of split routing. Statements in the Partial Final Award further confirm the Arbitration Panel's doubts about the timing of GLL's termination of split routing: "In assessing Claimants' position in this matter, a few points bear noting. First, not only did Meyer, Briles and the other members of Global Link management team who had allegedly deceived GTCR in the negotiations remain in the employ of the new Company; there is no evidence in the record that they were disciplined or chastised. Second, there is no mention of split-routing as being illegal or otherwise in the post-acquisition Board minutes of Global Link Logistics or GTCR's periodic reports to its investors or bank lenders. . . . Finally, Claimants did not self-report to the FMC until May 21, 2008 ...-- nearly two months after learning of split-routing practice. Rocheleau testified that it took 'some time' to quantify the extent of split-routing, but that fact does not explain the delay of a further year or more in notifying the FMC...." (Partial Final Award, at p. 15) (MOL Exh. A) (MOL App., at p. 15).

108. Most of the contracts being used belonged to the Hecny Group, a Hong Kong–based logistics company, and Global Link could not amend them. *Id.* at ¶ 7 (GLL App. 165).

Further, service contracts between carriers and NVOCCs run from May 1st to April 30th and Gary Meyer and Jim Briles, who negotiated Global Link's contracts, stated it would be impossible to accomplish these significant amendments to the contracts in mid-term. *Id.* Ultimately, after consulting with its then legal counsel, it was determined that Global Link would negotiate new service contracts in the May, 2007 negotiating season, which would eliminate any incentive to engage in split routing in the future. *Id.*

RESPONSE: The CJR Respondents dispute paragraph 108. The service contracts at issue in this lawsuit were between MOL and GLL, not MOL and Hecny. (GLL's Response to Mitsui O.S.K. Lines Ltd.'s Proposed Findings of Fact numbers 11, 14, and 15). Further, GLL admitted that its service contracts with MOL were amended on occasion. (GLL's Response to Mitsui O.S.K. Lines Ltd.'s Proposed Findings of Fact number 15). GLL's arguments that it could not have tried to end the practice of split routing sooner are thus without merit.

109. MOL is one of the steamship lines with which Global Link had service contracts. *Id.* at ¶ 8 (GLL App. 166).

RESPONSE: The CJR Respondents do not dispute paragraph 109.

110. Christine Callahan was hired by Global Link and instructed to ensure that it complied with FMC regulations and to put an end to Global Link's split routing practices. *Id.* at ¶ 9 (GLL App. 166).

RESPONSE: The CJR Respondents do not have information or knowledge sufficient to respond to GLL's allegations with respect to Mr. Callahan's hiring and any instruction she was given.

111. Global Link informed MOL that the split routing practices needed to be terminated. *Id.* at ¶ 10 (GLL App. 166).

RESPONSE: The CJR Respondents do not dispute paragraph 111.

112. Global Link's current owners, Golden Gate, took every reasonable step to terminate split routing with MOL in a timely fashion. *Id.* at ¶ 11 (GLL App. 166).

RESPONSE: The CJR Respondents dispute paragraph 112. For the reasons set forth in the CJR Respondents' response to paragraph 107, GLL's assertion that it "took every reasonable step to terminate split routing with MOL in a timely fashion" is without merit as GLL waited for nearly an entire year before ending the practice of split routing.

113. Golden Gate suffered significant losses as a result of the actions of the prior owners of Global Link and of MOL in encouraging and engaging in split routing. *Id.* at ¶ 12 (GLL App. 166).

RESPONSE: The CJR Respondents dispute paragraph 113. To the extent split routing resulted in cost savings to GLL (which the CJR Respondents deny), GLL benefited from those savings.

114. Early in the year 2007, Christine Callahan was hired by Global Link as the new Chief Operations Officer and instructed to ensure that Global Link complied with FMC regulations and to put an end to Global Link's split routing practices. Callahan Dec. at ¶ 4, Exh. A (GLL App. 1).

RESPONSE: The CJR Respondents do not have information or knowledge sufficient to respond to GLL's allegations with respect to Mr. Callahan's hiring and any instruction she was given.

115. Soon after her arrival at Global Link, Ms. Callahan entered into negotiations with steamship lines in regard to service contracts for the upcoming year (May 1st to April 30th). Christine Callahan Dec. at ¶ 5 (GLL App. 1). One of the steamship lines with which she negotiated was MOL. *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 115.

116. Ms. Callahan's primary contact at MOL for these negotiations was Paul McClintock. *Id.* at ¶ 6 (GLL App. 1).

RESPONSE: The CJR Respondents do not dispute paragraph 116.

117. Paul McClintock was the Vice President/General Manager of the Southeastern Region of the United States for MOL. He was Global Link's primary contact because of Global Link's location in that region. MOL handled a large number of shipments to the United States for Global Link. *Id.* at 7 (GLL App. 1).

RESPONSE: The CJR Respondents do not dispute paragraph 117.

118. Pursuant to instruction from Ms. Callahan, in March of 2007, Jim Briles of Global Link informed MOL that Global Link wanted to change its service contract from having only a limited number of door points to adding more door points and using container yard [CY] and port rates. *See* Jim Briles Dep. at 129:7-19, Exh. D (GLL App. 95).

RESPONSE: The CJR Respondents object to paragraph 118 on the grounds that Mr. Briles' deposition is not admissible in this proceeding for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 118.

119. Subsequently, Paul McClintock and Rebecca Yang of MOL came to Global Link's offices to discuss the new contract and Global Link's desire to get away from the split routing practices, which involved only a handful of door points. *Id.* at 128:10-129:19 (GLL App. 95).

RESPONSE: The CJR Respondents object to paragraph 119 on the grounds that Mr. Briles' deposition is not admissible in this proceeding for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 119.

120. MOL told Global Link it would not cease split routing because it was too time–consuming to negotiate individual delivery points. *Id.* Jim Briles further testified that when he requested that a different door point be added to the MOL-Global Link service contract for a particular shipment, Rebecca Yang, through McClintock, requested that Global Link instead move the shipment as a split. *Id.* at 124:20-125:4 (GLL App. 94).

RESPONSE: The CJR Respondents object to paragraph 120 on the grounds that Mr. Briles' deposition is not admissible in this proceeding for the reasons set forth above. Responding further, the CJR Respondents do not dispute paragraph 120.

121. Hessel Verhage, the President of Global Link, and Christine Callahan had lunch with Paul McClintock and Rebecca Yang of MOL in which it was explained that Global Link

could no longer engage in split routing with MOL. *See* Verhage Dec. at ¶ 4, January 24, 2013 attached as Exhibit J (GLL App. 167). At that lunch, Ms. Yang and Mr. McClintock expressed disappointment that Global Link was no longer willing to do split routing. *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 121.

122. In June of 2007, when MOL still had not provided the information for the new contract necessary to eliminate the split routings, Christine Callahan, wrote McClintock that Global Link could not continue to use the existing methodology in the contract and the parties needed to get the CY rates in place as quickly as possible. *See* June 05, 2007 email correspondence from Christine Callahan to Paul McClintock, attached as Exhibit K (GLL App. 168-169).

RESPONSE: The CJR Respondents do not dispute paragraph 122.

123. When almost three weeks later, MOL still had not responded, Ms. Callahan wrote again:

> "Although you explained to us the challenges you have internally at MOL regarding the change in methodology to CY moves vs. *the split door service MOL has historically provided,* we haven't been advised of any change.
>
> We've waited as long as we possibly can. Therefore, I have advised both Jim and Molly that *we must discontinue supporting MOL on the split moves* as we do not have MOL CY rates in place that will allow us to arrange our own trucking. This instruction has been given with immediate effect."

See June 20, 2007 email from Christine Callahan to Paul McClintock, Exh. K (GLL App. 168) (emphasis supplied).

RESPONSE: The CJR Respondents do not dispute paragraph 123.

124. Although Paul McClintock suggested in his deposition testimony that he did not know what was meant by the term "split door service," at no point did he ever ask Ms. Callahan what was meant by the term or indicate any uncertainty as to its meaning. *See* Christine Callahan Dec. at ¶ 13, Exh. A (GLL App. 2).

RESPONSE: The CJR Respondents do not dispute paragraph 124.

125. On July 17 and 18, 2007, Rebecca Yang of MOL and Jim Briles of Global Link corresponded in regard to the shipment of cargo to Bentonville, Arkansas. *See* email attached as Exhibit L (GLL App. 170-1). In the correspondence, despite having been told on numerous occasions that Global Link was no longer willing to engage in split routing, and knowing that Global Link's customer was bringing its containers into Bentonville, Arkansas, Rebecca Yang suggested a split routing whereby Global Link would use the Fort Smith, Arkansas rate rather than the Bentonville, Arkansas rate because Bentonville rates were higher. *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 125.

126. Jim Briles responded that Global Link could no longer engage in split routing, *i.e.*, "cannot use alternative doors." *Id.* Rebecca Yang's response of "SIGH" reflected MOL's disappointment that Global Link was no longer willing to engage in split routing. *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 126.

127. On July 26, 2007, less than ten days later, MOL again corresponded with Global Link in regard to a split routing proposal in which goods would move under a Monroe, Louisiana door rate but actually go to Winnsboro, Louisiana with MOL contributing to the extra trucking costs from the service contract point to the actual destination. In response, a clearly exasperated

Global Link states "Why is MOL accepting these if not in the contract????" *See* July 26, 2007 correspondence attached as Exhibit M (GLL App. 172). In this instance, Paul McClintock had increased the fuel allowance for truckers so as to make the split routing more enticing. "So now Paul increased the fuel allowance for Monroe to $200 from $125." Once again, however, Jim Briles informed Rebecca Yang and Lauren Estrada of MOL that "for vineyard to Winnsboro, la – I cannot book there anymore since we have Monroe LA door and you know the whole situation." *Id.*

RESPONSE: The CJR Respondents do not dispute paragraph 127.

128. Despite Global Link's continued insistence that it would not engage in split routing, MOL's resistance to moving away from split routing was so entrenched that months after Global Link had told MOL that it refused to engage in split routing, on August 6, 2007, Jim Briles wrote to Rebecca Yang and Paul McClintock requesting a meeting about getting Global Link's rates changed to CY rates because "we have not had any movement on this as of yet." *See* August 6, 2007 email attached as Exhibit N (GLL App. 173).

RESPONSE: The CJR Respondents do not dispute paragraph 128.

129. Ultimately, MOL did provide Global Link with CY rates but Global Link's business with MOL was reduced as compared to the volume of business it did with them when the parties were engaging in split routing. *See* Christine Callahan Dec, at ¶ 12, Exh. A (GLL App. 2).

RESPONSE: The CJR Respondents do not dispute paragraph 129.

130. Global Link incorporates by reference MOL's Proposed Findings of Fact at ¶¶'s 115-163.

RESPONSE: The CJR Respondents incorporate by reference their responses and objections to paragraphs 115 through 163 of MOL's Proposed Findings of Fact.

Respectfully submitted,

Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
GROVE, JASKIEWICZ and COBERT, LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Benjamin I. Fink (bfink@bfvlaw.com)
Neal F. Weinrich (nweinrich@bfvlaw.com)
BERMAN FINK VAN HORN P.C.
3475 Piedmont Rd., Suite 1100
Atlanta, Georgia 30305
Tel: (404) 261-7711
Fax: (404) 233-1943

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg

Dated: May 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May ___, 2013, I have this day served the foregoing document upon the following individual(s):

David Street (dstreet@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
GKG Law, PC
1054 31st Street, Ste. 200
Washington, D.C. 20007
(via electronic mail and hand delivery)

Attorneys for Respondent Global Link Logistics, Inc.

Marc J. Fink (mfink@cozen.com)
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
(via electronic mail and hand delivery)

David Y. Loh (dloh@cozen.com)
Cozen O'Connor
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
(via electronic mail and Federal Express)

Attorneys for Complainant Mitsui O.S.K. Lines, Ltd.

Warren L. Dean (wdean@thompsoncoburn.com)
C. Jonathan Benner
(jbenner@thompsoncoburn.com)
Harvey Levin (hlevin@thompsoncoburn.com)
Kathleen E. Kraft (kkraft@thompsoncoburn.com)
Thomson Coburn LLP
1909 K Street, N.W., Ste. 600
Washington, D.C. 20006
(via electronic mail and hand delivery)

Andrew G. Gordon (agordon@paulweiss.com)
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(via electronic mail and Federal Express)

Attorneys for Respondents Olympus Partners, L.P.; Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P., Louis J. Mischianti; David Cardenas and Keith Heffernan

Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
GROVE, JASKIEWICZ and COBERT, LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg

511109

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S PROPOSED FINDINGS OF FACT IN SUPPORT OF THEIR OPPOSITION TO RESPONDENT AND CROSS COMPLAINANT GLOBAL LINK LOGISTICS, INC.'S CROSS-CLAIM FOR CONTRIBUTION

Pursuant to the Orders of the Administrative Law Judge and Rule 221 of the Commission's rules of practice and procedure, Respondents CJR World Enterprises, Inc. ("CJRWE") and Chad J. Rosenberg (collectively, "CJR Respondents") hereby submit their Proposed Findings of Fact in support of their Opposition to Global Link Logistics, Inc.'s ("GLL") cross-claim for contribution:

CJR RESPONDENTS' PROPOSED FINDINGS OF FACT[1]

1. Mr. Rosenberg founded GLL in 1997. (Declaration of Chad Rosenberg, dated February 26, 2013 ("Rosenberg Dec."), at ¶ 7) (CJR Exh. A) (CJR Respondents' Appendix ("CJR App."), at p. 2).[2]

2. CJRWE was an owner of GLL from 2003 through June 7, 2006. (Rosenberg Dec., at ¶¶ 12, 33) (CJR Exh. A) (CJR App., at pp. 3, 6).

3. On May 20, 2006, CJRWE and the other owners of GLL entered into a stock purchase agreement ("SPA") with GLL's current owners. *See Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al* , FMC No. 09-01, at 2 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss); (Partial Final Award in *Global Link Logistics, Inc et al. v. Olympus Growth Fund III, L.P. et al.*, American Arbitration Association, Case No. 14 125 Y 01447 07 ("Partial Final Award"), at p. 14) (MOL Exh. A) (MOL's Appendix ("MOL App."), at p. 14); (GLL's Verified Answer and Affirmative Defenses to Mitsui O.S.K. Lines Ltd.'s Complaint, Counterclaim, and Cross Claims ("GLL's Verified Cross Claims"), annexed hereto as Exhibit P, at p. 13, para. 2) (CJR App., at p. 288).

---

[1] The CJR Respondents also incorporate their Proposed Findings of Fact in Support of their Opposition to MOL's claims by reference. As set forth in their Proposed Findings of Fact in Support of their Opposition to MOL's claims, the CJR Respondents did not actively participate in any shipments at issue in this case. As also set forth in their Proposed Findings of Fact in Support of their Opposition to MOL's claims – and as GLL also argues and as the Panel in the Arbitration found – MOL was aware of and encouraged the practice of split routing.

[2] The CJR Respondents' Appendix submitted in support of their Brief in Response to GLL's Opening Brief in Support of its Claims for Contribution ("Brief in Response to GLL") is a continuation of the Appendix the CJR Respondents submitted in support of their Brief in Response to the Opening Submission of Complainant Mitsui O.S.K. Lines, Ltd. ("Brief in Response to MOL"). Accordingly, any documents submitted to support the Brief in Response to GLL, which were not submitted to support the Brief in Response to MOL, will begin with CJR Exhibit "J" and will begin at CJR Appendix p. 102. Any citations to CJR Exhibits A through I or to CJR App. pp. 1 though 101, reference the Appendix the CJR Respondents submitted in support of their Brief in Response to MOL.

4. A copy of the SPA is annexed hereto as Exhibit J.

5. The SPA provided that the current owners of GLL would acquire all the stock of GLL. *See generally* (SPA) (CJR Exh. J) (CJR. App., at pp. 102-67).

6. The SPA was heavily negotiated. (Partial Final Award, at pp. 1-2, 13-14) (MOL Exh. A) (MOL App., at pp. 1-2, 13-14).

7. The buyers of GLL were represented by a sophisticated private equity firm, sophisticated legal counsel, and outside industry consultants. (Partial Final Award, at pp. 2, 13, 29, 55) (MOL Exh. A) (MOL App., at pp. 2, 13, 29, 55).

8. The SPA governs the rights and obligations of the current and former owners of GLL in connection with the acquisition and sale of GLL and any resulting claims in connection therewith. (SPA) (CJR Exh. J) (CJR App., at pp. 102-67).

9. Section 10.02(c) of the SPA provides for an exclusive remedy for any and all losses or other claims relating to or arising from the SPA or the transactions contemplated thereby. (SPA, at para. 10.02(c)) (CJR Exh. J) (CJR App., at p. 37).

10. Section 10.02(f) of the SPA provides that the buyers of GLL shall not be entitled to recover losses relating to any matter arising under one provision of the SPA to the extent

that they already recovered losses with respect to such matter pursuant to other provisions of the SPA. (SPA, at para. 10.02(f)) (CJR Exh. J) (CJR App., at p. 138).

11. Section 10.08(a) of the SPA provides that all claims for money damages arising out of the SPA are to be resolved in arbitration. (SPA, at para. 10.08(a)) (CJR Exh. J) (CJR App., at p. 140).

12. Section 10.10 of the SPA limits GLL's recourse against Mr. Rosenberg. (SPA, at para. 10.10) (CJR Exh. J) (CJR App., at p. 142).

13. In conjunction with the SPA, on May 20, 2006, Mr. Rosenberg executed a Release, Confidentiality, Non-Compete and Non-Solicitation Agreement between he and GLL (the "Rosenberg Agreement").

14. Section 1.1.2 of the Rosenberg Agreement contains a broad general release of any claims which Global Link has or might have against Mr. Rosenberg. (Rosenberg Agreement, annexed hereto as Exhibit O, at para. 1.1.2) (CJR App., at p. 266)

15. The sale of GLL closed on June 7, 2006. (Partial Final Award, at p. 14) (MOL Exh. A) (MOL App., at p. 14).

16. On June 6, 2007, the current owners served a Notice of Claim on the former owners pursuant to the SPA ("Notice of Claim"). A copy of the Notice of Claim is annexed hereto as Exhibit K.

17. The Notice of Claim specifically asserted claims by GLL against the former owners based on, among other things, GLL's alleged potential liabilities to ocean carriers: " . . . the Company and its Subsidiaries redirected thousands of shipments to destinations other than those represented to ocean carriers and stated on ocean bills of lading, with the purpose and effect of deceiving ocean carriers and others and obtaining ocean transportation of property at less than the rates that would have applied if the ocean shippers had know the true destinations for those shipments. That conduct created potential liabilities for fines and damages . . . ." (Notice of Claim, at pp. 2-3) (CJR Exh. K) (CJR App., at pp. 170-71).

18. On or about August 31, 2007, the current owners of GLL filed the arbitration styled *Global Link Logistics, Inc. et al v Olympus Growth Fund III, L.P. et al.*, American Arbitration Association, Case No. 14 125 Y 01447 07 (the "Arbitration"). (Partial Final Award, at p. 2) (MOL Exh. A) (MOL App., at p. 2).

19. In its Statement of Claim in the Arbitration, GLL specifically alleged and sought damages based on alleged potential liabilities to third parties:

> 55. These emails, . . . show that the statements in the Harris pitch book . . . were just lies – lies told as part of a complex, multi-year scheme by Cardenas, Mischianti, Rosenberg, and others to . . . (c) leave the new owners holding millions of dollars in

concealed contingent liabilities for potential fines and/or damages under the Shipping Act. . . .

77. It was also a costly fraud – one that caused the Purchasers to suffer more than $100,000,000 in actual damages. As the direct and proximate result of Global Link 2003's undisclosed and fraudulent 'practice of diverting cargo to [destinations] other than what's on the original [ocean bill of lading]," which ... created potential liabilities for millions of dollars in fines and damages ... Holdings 2003 and its subsidiaries were worth no more than $35,000,000 when the Fraud Respondents duped the Purchasers into signing the SPA on or about May 20, 2006.

84. ...[T]hat pattern and practice of wire fraud enabled the Fraud Respondents to ... (c) leave Holdings 2003, Global Link 2003, and the Purchasers holding the bag: contingent liabilities for millions of dollars in potentia fines and damages attributable to knowing violations of the wire-fraud statute, the RICO Act, the Shipping Act, and other applicable laws...

(Claimants' Statement of Claim, annexed hereto as Exhibit L, at paras. 55, 77, 84)

(CJR App., at pp. 194, 203, 205) (emphasis supplied).

20. In later pleadings in the Arbitration, GLL continued to assert that the former owners had made misrepresentations to the buyers regarding GLL's pre-sale compliance with its contracts with the ocean carriers, including MOL, as well as regarding the non-existence of any liabilities above stated amounts:

61. In Section 4.09(b) of the SPA, they caused Holdings 2003 to represent and warrant that, with respect to each contract listed on Section 4.09 of the Disclosure Schedules, including service agreements between Global Link 2003 and ocean carriers CMA GMC (America), Inc., **Mitsui O.S.K. Lines, Ltd.**, and CP Ships USA, LLC, "(i) the agreement is valid and in full force and effect; (ii) neither the Company nor, to the knowledge of the Company, any other party, is in breach of or violation of, or default under, any such agreement such that the breach or default would result in a Loss of greater than $100,000; and (iii) no event has occurred... which, after the giving of notice, with lapse of time, or otherwise, would constitute a breach, violation or default by the Company or any of its Subsidiaries... such that the breach, violation or default would result in a Loss of greater than $100,000."

62. In Section 4.21 of the SPA, they caused Holdings 2003 to represent and warrant that, "[t]o the Company's knowledge (after due inquiry), neither the

Company nor any of its Subsidiaries is subject to any liability of a type that would appear on a balance sheet (other than any liability, together with the liabilities arising from all related items or events, as would not result in a Loss to the Company and its Subsidiaries in excess of $100,000) arising out of events, transactions or actions or inactions arising prior to the date hereof; except (i) liabilities under leases, licenses, contracts and agreements described in the Schedules hereto or under leases contracts and agreements which are not required to be disclosed thereon, (ii) liabilities arising out of or related to the transactions contemplated [by the SPA], (iii) liabilities reflected on the Latest Balance Sheet or liabilities which have arisen after the date of the Latest Balance Sheet in the ordinary course of business consistent with past practices and (iv) liabilities otherwise disclosed on the Schedules attached [to the SPA]."

(Claimants' Second Amended Statement of Claim, annexed hereto as Exhibit M, at paras. 61-62) (CJR App., at pp. 231-32) (emphasis supplied); *see also* (Claimants' Statement of Claim, at paras. 62-63) (CJR. Exh. L) (CJR App. at pp. 197-98); (Claimants' Amended Statement of Claim, at paras. 62-63) (MOL Exh. AG) (MOL's Appendix ("MOL App."), at pp. 1454-55).

21. The Arbitration proceeded to a hearing on the merits. (GLL's Proposed Findings of Fact in Support of Contribution Claim Against Rosenberg and Olympus Respondents ("GLL's Proposed Findings of Fact") numbers 2-4); *see also* (Partial Final Award) (MOL Exh. A) (MOL App., at pp. 1-63).

22. The Arbitration included seven days of hearings, live testimony of twelve witnesses, and videotaped deposition testimony from fourteen witnesses. (GLL's Proposed Findings of Fact numbers 3 and 4).

23. Both parties presented expert testimony, and GLL had the opportunity to have its expert(s) opine on the likelihood and anticipated amount of third-party liabilities. (Partial Final Award, at p. 4) (MOL Exh. A) (MOL App., at p. 4).

24. Following the hearing, post-hearing briefing, and closing arguments, the Panel issued its Partial Final Award, resolving all claims asserted and submitted in the Arbitration. (Partial Final Award, at p. 1) (MOL Exh. A) (MOL App., at p. 1).

25. In the Partial Final Award, the Panel noted that while in their Second Amended Statement of Claim Global Link had alleged misrepresentations by the Sellers based on the above representations in the SPA concerning its contracts with ocean carriers, Global Link did not rely upon these alleged theories of recovery in their pre- or post-hearing submissions to the Panel: "In the Second Amended Statement of Claim, Claimants also invoked contractual representations regarding compliance with Global Link's contracts with the ocean carriers with which it dealt (§ 4.09(b)) and the non-existence of liabilities above stated amounts (§ 4.21). These representations are not mentioned in Claimants' Pre-Hearing Brief or Proposed Findings of Fact and Conclusions of Law, and we will not further address them." (Partial Final Award, at p. 5) (MOL Exh. A) (MOL App., at p. 5).

26. The Panel in the Arbitration also did not find that GLL was not at fault for continuing the practice of split routing for a year after it learned of it. To the contrary, findings by the Panel suggest that the Panel found GLL's claim to be an "innocent bystander" dubious: "In assessing Claimants' position in this matter, a few points bear noting. First, not only

did Meyer, Briles and the other members of Global Link management team who had allegedly deceived GTCR in the negotiations remain in the employ of the new Company; there is no evidence in the record that they were disciplined or chastised. Second, there is no mention of split-routing as being illegal or otherwise in the post-acquisition Board minutes of Global Link Logistics or GTCR's periodic reports to its investors or bank lenders. . . . Finally, Claimants did not self-report to the FMC until May 21, 2008 ...-- nearly two months after learning of split-routing practice. Rocheleau testified that it took 'some time' to quantify the extent of split-routing, but that fact does not explain the delay of a further year or more in notifying the FMC...." (Partial Final Award, at p. 15) (MOL Exh. A) (MOL App., at p. 15)..

27. In the Partial Final Award, the Panel found that the Claimants were entitled to a damages award of $12 million. (Partial Final Award) (MOL Exh. A) (MOL App., at pp. 1-63).

28. The buyers were awarded the difference between the actual value of GLL at the time of the closing date in light of the split routing practice, as determined by the Arbitrators, and the purchase price the buyers paid. (Partial Final Award) (MOL Exh. A) (MOL App., at pp. 1-63).

29. That award necessarily included an amount equal to the discount on the purchase price that resulted from the risk of potential liability to GLL's ocean carrier partners, including MOL, that resulted from split-routing.

30. This is true regardless of whether GLL specifically asked the Panel to award damages based on potential liabilities to third parties (which GLL did in its pleadings), regardless of GLL's failure to present testimony at the Arbitration from witnesses or a damages expert on potential liabilities to ocean carriers for which GLL had asserted it was entitled to recover (which GLL indisputably had the opportunity to do), and regardless of whether the Panel stated whether its damages award was intended to compensate GLL for potential third-party liabilities.

31. The award has been fully satisfied. (October 8, 2009 Order confirming the Arbitration Award, marked "satisfied" on November 5, 2010, annexed hereto as Exhibit Q) (CJR App., at pp. 298-302).

Respectfully submitted.

Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
GROVE, JASKIEWICZ and COBERT, LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Benjamin I. Fink (bfink@bfvlaw.com)
Neal F. Weinrich (nweinrich@bfvlaw.com)
BERMAN FINK VAN HORN P.C.
3475 Piedmont Rd., Suite 1100
Atlanta, Georgia 30305
Tel: (404) 261-7711
Fax: (404) 233-1943

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg

Dated: May 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2013, I have this day served the foregoing document upon the following individual(s):

David Street (dstreet@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
GKG Law, PC
1054 31st Street, Ste. 200
Washington, D.C. 20007
(via electronic mail and hand delivery)

Attorneys for Respondent Global Link Logistics, Inc.

Marc J. Fink (mfink@cozen.com)
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
(via electronic mail and hand delivery)

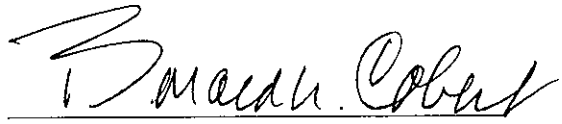
David Y. Loh (dloh@cozen.com)
Cozen O'Connor
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
(via electronic mail and Federal Express)

Attorneys for Complainant Mitsui O S K. Lines, Ltd.

Warren L. Dean (wdean@thompsoncoburn.com)
C. Jonathan Benner
(jbenner@thompsoncoburn.com)
Harvey Levin (hlevin@thompsoncoburn.com)
Kathleen E. Kraft (kkraft@thompsoncoburn.com)
Thomson Coburn LLP
1909 K Street, N.W., Ste. 600
Washington, D.C. 20006
(via electronic mail and hand delivery)

Andrew G. Gordon (agordon@paulweiss.com)
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(via electronic mail and Federal Express)

Attorneys for Respondents Olympus Partners, L P.; Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P.; Louis J. Mischianti; David Cardenas and Keith Heffernan



Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
GROVE, JASKIEWICZ and COBERT, LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

TABLE OF CONTENTS
FOR RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S BRIEF IN RESPONSE TO GLOBAL LINK LOGISTICS, INC.'S OPENING BRIEF IN SUPPORT OF ITS CLAIMS FOR CONTRIBUTION

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

TABLE OF AUTHORITIES FOR RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S BRIEF IN RESPONSE TO GLOBAL LINK LOGISTICS, INC.'S OPENING BRIEF IN SUPPORT OF ITS CLAIMS FOR CONTRIBUTION

CASES

COMMISSION AND ALJ ORDERS

STATUTES, REGULATIONS, AND RULES

OTHER AUTHORITY

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG

RESPONDENTS

RESPONDENTS CJR WORLD ENTERPRISES, INC. AND CHAD J. ROSENBERG'S BRIEF IN RESPONSE TO GLOBAL LINK LOGISTICS, INC.'S OPENING BRIEF IN SUPPORT OF ITS CLAIMS FOR CONTRIBUTION

Pursuant to the Orders of the Administrative Law Judge and Rule 221 of the Commission's Rules of Practice and Procedure, Respondents CJR World Enterprises, Inc. ("CJRWE") and Chad J. Rosenberg (collectively, "CJR Respondents") hereby submit their Brief in Response to Global Link Logistics, Inc.'s ("GLL") Opening Brief in Support of its Claims for Contribution Against the Rosenberg and Olympus Respondents ("GLL's Cross-Claim Brief").[1]

[1] The CJR Respondents adopt the Olympus Respondents' Brief in opposition to GLL's cross-claim to the extent it is not inconsistent with the arguments raised herein.

INTRODUCTION

GLL's cross-claim should be rejected for numerous reasons.

First and foremost, GLL's cross-claim for contribution fails because MOL's claim fails, *as GLL itself acknowledges*. There is thus no liability as to which GLL may seek contribution.

Second, GLL's claim for contribution should be dismissed because it is premature. GLL has not been found liable to MOL, GLL has not been required to pay more than its proportionate share of any alleged liability, and GLL has not paid anything to MOL, let alone more than its proportionate share of the alleged liability. Under basic contribution law including rulings from the Commission in this case, GLL's claim for contribution is premature.

Third, in its Brief GLL requests the Court shift the *entire* liability to the CJR Respondents and Olympus Respondents. GLL's argument reflects a fundamental misunderstanding of the law of contribution and is unsupported by any law.

Fourth, GLL's attempt to shift liability to its former owners is fundamentally contradictory to bedrock corporate law. The current owners of GLL acquired the company through a stock sale. Therefore, any liabilities the company had, including any contingent or unknown liabilities, remained with the company, and the parties' stock purchase agreement governs the parties' rights and obligations with respect to the transaction. GLL's attempt to shift the liability to GLL's former owners is contradictory to corporate law and the parties' agreements.

Fifth, GLL's cross-claim fails because GLL was fully compensated for any damages allegedly caused to it by the former owners of GLL by the award ("Partial Final Award") that GLL obtained in the arbitration styled *Global Link Logistics, Inc. et al. v. Olympus Growth Fund III, L.P et al.*, American Arbitration Association, Case No. 14 125 Y 01447 07 (the

"Arbitration"). GLL's recovery in the Arbitration necessarily encompassed compensation for any potential liabilities to ocean carriers resulting from the sale of GLL. GLL's claim for contribution is an attempt at a double recovery and is barred by res judicata.

Sixth, GLL's claim for contribution fails based on specific findings in the Arbitration which GLL is precluded from relitigating in this action. Those findings bar GLL's claim for contribution.

Finally, GLL's claim for contribution against the CJR Respondents is barred by agreements executed in connection with the 2006 sale. Those agreements limit GLL's recourse against the CJR Respondents and include a release of Mr. Rosenberg. That release encompasses GLL's cross-claim.

For all of these reasons and as set forth more fully below, the Administrative Law Judge ("ALJ") should find in favor of the CJR Respondents on GLL's cross-claim.

STATEMENT OF FACTS

The CJR Respondents' Proposed Findings Fact in Support of their Opposition to GLL's Cross-Claim for Contribution, which are being filed separately, are incorporated herein. The CJR Respondents also incorporate by reference their Proposed Findings of Fact in Support of their Opposition to MOL's claims.

ARGUMENT AND CITATIONS OF AUTHORITY

A. GLL's Claim for Contribution Fails Because MOL's Claims Fail.

As set forth in GLL's Brief in Support of its Opposition to MOL's Request for Relief ("GLL's Opposition Brief"), as well as the CJR Respondents and Olympus Respondents' Briefs in Response to MOL's claims, MOL's claims against the Respondents fail. Indeed, GLL's Opposition Brief vigorously and comprehensively demonstrates that MOL's claims fail because MOL was aware of and condoned split routing:

- "The sworn testimony confirms not only that MOL was aware of the split routing but that it encouraged it as a business practice because it benefitted MOL." (GLL's Opposition Brief, at p. 2).
- "The evidence firmly establishes that, not only were MOL operational personnel aware of the split routing, but that MOL's knowledge and encouragement of split routing occurred at senior levels of management." (*Id.*, at p. 2).
- "The contemporaneous documents establish beyond cavil that MOL and its senior personnel knew about split routing during the time at issue." (*Id.*, at p. 4).
- "... the evidence of MOL's knowledge and encouragement of split routing is overwhelming." (*Id.*, at p. 6).
- "Given the overwhelming weight of evidence establishing that MOL was a willing participant in the split routing practices at issue...". (*Id.*, at p. 25).

Because MOL's claims against the Respondents fail, GLL's cross-claim for contribution also fails. Notably, GLL's positions with respect to its defense of MOL's claim and its cross-claim for contribution are wholly inconsistent. On the one hand, GLL adamantly (and accurately) asserts that the practice of split routing was not fraudulent because MOL approved of

and encouraged the practice. GLL correctly relies on this argument as a complete defense to MOL's claims.

On the other hand, GLL claims that the CJR Respondents and the Olympus Respondents defrauded them by failing to disclose the practice of split routing. However, if MOL and GLL engaged in the practice of split routing with each other's knowledge and consent, as GLL correctly argues, then the CJR Respondents and the Olympus Respondents did not defraud the current owners of GLL by allegedly failing to disclose the practice when the company was sold to the current owners. That is, if the practice of split routing was not fraudulent because MOL knew and approved of it, the CJR Respondents and Olympus Respondents are not at fault for any alleged failure to disclose the practice (which the CJR Respondents deny). GLL's arguments otherwise are an attempt by GLL to "have its cake and eat it too", and GLL should be estopped by its own assertions against MOL from asserting that it was defrauded by the CJR Respondents or the Olympus Respondents.

B. <u>GLL's Claim for Contribution Is Premature.</u>

" . . . [A]ny cause of action for contribution by Global Link against Olympus Respondents and CJR Respondents is dependent on a determination by the Commission that Global Link is liable to Mitsui and required to pay more than ts proportionate share of liability." *Mitsui O.S.K Lines Ltd. v. Global Link Logistics, Inc., et al.*, FMC No. 09-01, at 27 (FMC Aug. 1, 2011) (Order Denying Appeal Of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motion to Dismiss) (the "August 1, 2011 Commission Order"). "If the ALJ determines that Global Link is liable to Mitsui for reparations and requires Global Link to pay more than its proportionate share, the Commission may consider at that time whether it

wishes to adopt the principle of contribution." *Id.* at 26-27. Furthermore, it is a bedrock rule of law that a contribution claim does not accrue until a joint tortfeasor *pays* more than its proportionate share. *See, e.g., Trustees of Bricklayers & Allied Craftsman, Local 3 Health & Welfare Trust v. Structures Mideast Corp.*, 958 F.2d 378 (9th Cir. 1992) ("A cause of action for indemnity or contribution accrues when payment has been made." (*quoting Aetna Casualty & Sur. Co. v. Aztec Plumbing Corp.*, 796 P.2d 227, 228 (Nev.1990)); *Wojciechowicz v. United States*, 474 F. Supp. 2d 291, 295 (D.P.R. 2007) ("The right to [contribution] accrues when a joint tortfeasor pays more than his proportional share of liability."); *New Zealand Kiwifruit Marketing Board v. City of Wilmington*, 825 F.Supp. 1180, 1190 (D. Del. 1993) ("[T]he Delaware courts have held that while the right to contribution attaches at the time of the negligence, the right to secure a money judgment is inchoate until the judgment debtor discharges more than his pro rata share of the common liability.") (*citing Fehlhaber v. Indian Trails, Inc.*, 45 F.R.D. 285, 286 (D. Del. 1968)); *Hall v Hickman*, 1987 WL 17176, at *4 (Del. Super. Sept. 8, 1987) ("In Delaware, there is a distinction made between the substantive right of contribution and the procedural right to institute the action for contribution. When the concurring negligence of joint tortfeasors gives the injury party a cause of action, the incidental right of a joint tortfeasor to compel contribution is created. However, this right remains contingent, subordinate and inchoate until one of the joint tortfeasors pays more than his proportionate share of the underlying claim. In this case, liability has yet to be established and therefore no obligation has been discharged. The defendant's contribution claim remains contingent and her procedural right to bring an action for contribution has not yet accrued." (citations omitted)); *Calder v. City of Crystal*, 318 N.W.2d 838, 841 (Minn. 1982) (*citing Gustafson v. Johnson*, 51 N.W.2d 108 (Minn. 1952) for the proposition that "[a] claim for contribution does not accrue or mature until the person entitled to

the contribution has sustained damage by paying more than his fair share of the joint obligation," and stating that "this was also the conclusion reached by virtually every jurisdiction that has considered the question"); *Nat'l Mut. Ins. Co. v. Whitmer*, 435 N.E.2d 1121, 1123 (Ohio 1982) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of the common liability. . . . [It is the] general rule that the right to contribution is inchoate from the time of the creation of the relationship giving rise to the common burden until the payment by a co-obligor of more than his proportional share, and that the right becomes complete and enforceable only upon a payment by the claimant extinguishing the whole of the common obligation. That is, even though the equity for contribution arises at the time of the creation of the relationship between the parties, the right to sue thereon accrues when a party has paid more than his share of the joint obligation." (*citing* several cases)).[2]

GLL's claim for contribution is not ripe. There has not been a determination by the Commission that GLL is liable to MOL. There has not been a determination by the Commission that GLL is required to pay more than its proportionate share of any alleged liability. GLL has not paid anything to MOL, let alone more than its proportionate share of the alleged liability. GLL's claim for contribution is thus premature. *See* August 1, 2011 Commission Order, at p. 26 ("As was the case in [*Int'l Ass'n of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 675 (ALJ

---

[2] *See also When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A L.R.3d 867 ("The rule generally recognized is that a claim for contribution based on tort, where such claim is authorized, does not accrue, and the statute of limitations does not start to run thereon, at the time of the commission of the tort, or of the resulting injury or damage, but from the time of the accrual of the cause of action for contribution, which is at the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof, or at the time of other satisfaction or discharge of such claim in whole or in part, to an extent greater than his pro rata share of the common liability, by the party seeking contribution . . . . A cause of action for contribution between tortfeasors is distinct from the injured person's cause of action for the tort. Such cause of action for contribution originates in the joint misconduct of the tortfeasors, but it remains an inchoate right until such time as one of the joint tortfeasors pays more than his fair share for the total damages resulting from such misconduct, at which time it ripens into a right to legal action to recover therefor. Thus, the cause of action for contribution accrues—becomes a right enforceable in a court action—when one of the joint tortfeasors pays more than his proportionate share of the damages. On the date of such payment the inchoate claim ripens into maturity, and whatever the applicable period of limitations, the time then starts to run.").

1990)], there is no need for the Commission to reach a determination at this time as to whether it wishes to adopt the principle of contribution among respondents. Global Link's request for contribution is conditioned on two events that have not occurred: it has not been found liable to Mitsui for reparations and it has not been required to pay more than its proportionate share of liability.").

C. The Law of Contribution Does Not Permit GLL's Attempt to Shift the Entire Alleged Liability.

GLL argues that it should not bear any of the entire alleged liability: "... any liability finding by the Presiding Judge should assess 100% of the blame upon the Rosenberg and Olympus Respondents rather than upon Global Link." (Respondent and Cross Complainant Global Link Logistics, Inc.'s Opening Brief in Support of its Claims for Contribution Against the Rosenberg and Olympus Respondents ("GLL's Cross-Claim Brief"), at p. 19). Setting aside that its claim for contribution is not ripe because it has not been found liable and it has not paid more than its share of a joint and several award, GLL's argument that it can shift the *entire* liability reflects a flawed understanding of the law of contribution.

"Typically, a right to contribution is recognized wher two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Nw Airlines, Inc v. Transport Workers Union of Am.*, 451 U.S. 77, 87–88 (1981). Thus, a claim for contribution requires the presence of jointly liable parties. *Stratton Grp., Ltd. v. Sprayregen*, 466 F. Supp. 1180, 1185 n.4, 1886 (S.D.N.Y. 1979) ("A precondition of contribution between two parties is that they be joint tortfeasors, the absence of which precludes any claim for contribution."). Because the CJR Respondents are not liable to MOL for the reasons set forth in their Response to MOL's Opening Submission (and thus cannot be jointly liable with GLL), GLL's cross-claim for contribution fails.

Furthermore, in most jurisdictions contribution allows one party to recover a proportionate share from the other liable party, whereas *indemnity* is the right of one party held liable to another to shift the entire burden of liability to a third party also liable for the same harm. *See, e.g., Va. Sur. Co. v. N. Ins. Co. of New York*, 840 N.E.2d 1271, 1274 (Ill. 2005) ("'There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead.'" (*quoting* Prosser, Law of Torts, sec. 51, at 310 (4th ed. 1971)); *Mo. Pac. R.R. Co. v. Star City Gravel Co.*, 452 F. Supp. 480, 481-82 (E.D. Ark. 1978) ("Contribution and indemnity are mutually exclusive remedies. The former distributes the loss among the tortfeasors by requiring each to pay his proportionate share, while indemnity shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead."); *Rosado v. Proctor & Schwartz, Inc.*, 484 N.E.2d 1354, 1356 (N.Y. 1985) ("Basically, in contribution the loss is distributed among tort-feasors, by requiring joint tort-feasors to pay a proportionate share of the loss to one who has discharged their joint liability, while in indemnity the party held legally liable shifts the entire loss to another.").[3] Here, GLL's cross-claim for indemnification was dismissed, and the Commission affirmed the dismissal. Thus, even

[3] *See also Stifle v. Marathon Petrol. Co.*, 876 F.2d 552, 558 (7th Cir. 1989) ("Indemnity is a common law doctrine which shifts the entire responsibility from one tortfeasor, who has been compelled to pay the loss, to another tortfeasor, who is truly culpable."); *Viens v. Anthony Co.*, 282 F. Supp. 983, 986 n.1 & 987 (D. Vt. 1968) (The right of contribution, where it exists, presupposes a common liability which is shared by the joint tortfeasors on a pro-rata basis. The right of indemnity, on the other hand, because of some special relationship existing between two tortfeasors shifts the entire loss upon the real wrongdoer"); *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 492 N.Y.S.2d 371, 374 (N.Y. App. Div. 1985) ("Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer."); *Glaser v. M. Fortunoff of Westbury Corp.*, 524 N.E.2d 413, 415 (N.Y. 1988) ("In the 'classic indemnification case,' the one seeking indemnity 'had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party.' In other words, 'where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent.'").

assuming that GLL and the CJR Respondents were found jointly liable to MOL, there is no legal basis for GLL to seek to shift the entire alleged liability to the CJR Respondents. Indeed, GLL cites no authority that in any way remotely suggests that the ALJ can find GLL liable but not require it to pay *any* of the award.

The ALJ should thus reject GLL's attempt to entirely deflect any liability it may be found to have as there is no basis in the law or the record in this case for the ALJ to award such relief.

D. <u>The Attempt by GLL's Current Owners to Shift a Corporate Liability to its Former Owners is Completely At Odds with Black Letter Corporate Law.</u>

"Where officers and directors [allegedly] use their corporation as an instrumentality to perpetrate a wrong, the subsequent purchase of the corporation from the wrongdoer does not insulate the corporation from liability. To do otherwise would 'overlook[ ] the fact that one of the essential attributes of a corporation is its continuing existence as an entity despite changes in control and ownership.'" *UCAR Int'l Inc. v. Union Carbide Corp.*, No. 00CV1338(GBD), 2004 WL 137073, at *13 (S.D.N.Y. Jan. 26, 2004) (*citing Holmes v Bateson*, 583 F.2d 542, 560 (1st Cir. 1978)). "The standard procedure for new owners seeking to avoid liability for past corporate misdeeds is to buy the assets and liabilities of the corporation, not i[t]s stock." *Id*; *see also Leeds & Northrup Co. v. N.L.R.B.*, 391 F.2d 874, 880 (3d Cir. 1968) ("[S]hareholders always purchase stock subject to the risk of litigation which may be brought against the corporation."); *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011) ("In the context of a stock sale agreement, the law presumes that all assets and liabilities transfer with the stock."); *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 536 (Minn. 1986) ("When a business is sold through the transfer of assets, the assets alone pass to the buyer. When a business is sold through a stock transfer, the buyer assumes not only the assets of the corporation, but also the liabilities."). That is, "[in] . . . a merger or stock acquisition, [] . . .

the predecessor's obligations and liabilities continue in the surviving entity." *Lockheed Martin Corp. v Gordon*, 16 S.W.3d 127, 134 (Tex. Ct. App. 2000); *see also Bertha v. Remy Int'l, Inc.*, 414 F. Supp. 2d. 869, 877 (E.D. Wis. 2006) ("Generally, ir an asset purchase transaction, the purchaser does not acquire liabilities of the corporation as a stock purchaser would"); *Glentel, Inc. v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992, 1000 (N.D. Ind. 2005) ("In the sale of a corporation's stock, all of the liabilities and debts of the corporation stay with the corporation."); *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1233 (Ind. 1994) ("Where a corporation's stock is sold, all liabilities of that corporation remain with that corporation. By contrast, where one corporation purchases the assets of another, the buyer does not assume the debts and liabilities of the seller." (*citing* 15 *Stephen M. Flanagan et al Fletcher Cyclopedia of the Law of Private Corporations* § 7122 (1990); *Markham v. Prutsman Mirror Co.*, 565 N.E.2d 385, 386-67 (Ind. Ct. App. 1991) (*citing Polius v. Clark Equip Co.*, 802 F.2d 75, 77 (3d Cir.1986))); *O.D. Silverstein, M.D, P.C. v. Servs., Inc.*, 418 N.W.2d 461, 463 (1987) ("Thus, while a sale of stock changes the makeup of the equity owners of the corporation, it does not change the legal existence of the corporation and, therefore, cannot extinguish the obligations of the corporation. To adopt defendant's position would create an untenable rule of law that, every time stock changes hands, the corporation can renounce its prior debts. In short, the debt follows the corporation, not the corporation's stockholders. The debt was created as an obligation of the corporation and remains such."); *Dep't of Transp. v. PSC Res, Inc.*, 175 N.J. Super. 447, 453, 419 A.2d 1151, 1154 (N.J. Super. Ct. Law Div. 1980) ("Where a corporation is acquired by the purchase of all of its outstanding stock, the corporate entity remains intact and retains its liabilities, despite the change of ownership."); *Missett v. Hub Int'l Pa., LLC*, 6 A.3d 530, 535 (Pa. Super. Ct. 2010) ("[W]hen an individual, group of individuals or company purchases some

or all of the stock in a corporation, the corporation's shareholders change, but the corporation itself remains the same legal entity as it was prior to the stock purchase."); *Davis v. Bigelow Bldg. Co.*, 274 P. 106, 106 (Wash. 1929) ("But a change in the ownership of the stock does not change the obligations of the corporation.").[4]

GLL's claim for contribution attempts to shift the blame for an alleged liability of the company to GLL's former owners. GLL's claim is thus completely contrary to these basic principles of corporate law. GLL is the entity that engaged in the transactions involving the practice of split routing. To the extent there is any liability associated with those transactions, the liability is the company's. When the current owners of GLL acquired GLL from CJRWE, the Olympus entities, and others, they acquired all of GLL's stock. *See generally* (Stock Purchase Agreement among GLL Sub Acquisition Inc. the Sellers party hereto, and GLL Holdings, Inc., May 20, 2006 ("SPA"), annexed hereto as Exhibit J) (CJR Appendix ("CJR App."), at pp. 102-67).[5] The liabilities of the company thus remained with the company following the sale, regardless of whether they were known, unknown or contingent. The former owners of GLL, including CJRWE, did not retain any liabilities of the company after the sale. Allowing GLL to seek contribution contravenes these basic rules of corporate law.

---

[4] *See also* James C. Freund, *Anatomy of a Merger Strategies and Techniques for Negotiating Corporate Acquisitions*, § 4.6.1, at 112 (1975) ("The basic ground rules are as follows: If T merges directly into P, the latter succeeds by operation of law to all of the liabilities of T, known or unknown. If P purchases T stocks, P does not itself assume T's liabilities; but since P has become the 100% owner of T, and since T remains subject to all of its pre-existing known and unknown liabilities, P has to be seriously concerned about those liabilities. The subsidiary mergers accomplish basically the same thing as the acquisition of T's stock, as far as T's liabilities are concerned; whether T merges into S or S merges into T, the liabilities are firmly enscon[c]ed in the subsidiary, although not directly assumed by P .").

[5] The CJR Respondents' Appendix submitted in support of their Brief in Response to GLL's Opening Brief in Support of its Claims for Contribution ("Brief in Response to GLL") is a continuation of the Appendix the CJR Respondents submitted in support of their Brief in Response to the Opening Submission of Complainant Mitsui O.S.K. Lines, Ltd. ("Brief in Response to MOL"). Accordingly, any documents submitted to support the Brief in Response to GLL, which were not submitted to support the Brief in Response to MOL, will begin with CJR Exhibit "J" and will begin at CJR Appendix p. 102. Any citations to CJR Exhibits A through I or to CJR App. pp. 1 though 101, reference the Appendix the CJR Respondents submitted in support of their Brief in Response to MOL.

Further, the buyers and sellers of GLL negotiated a stock purchase agreement to govern the buyers' acquisition of GLL's stock and the parties' rights and obligations in connection with the acquisition and sale. *See generally* (SPA) (CJR Exh. J.) (CJR App., at pp. pp. 102-67). The SPA provided remedies whereby the buyers could seek relief against the sellers in connection with the sale. (SPA, at para. 10.02) (CJR Exh. J.) (CJR App., at pp. 136-38). GLL exercised those remedies in the Arbitration and obtained an award in its favor. GLL has therefore been compensated for any alleged injuries in connection with the sale. Thus, in addition to contravening basic corporate law, GLL's claim for contribution against the former owners based on an alleged liability that belongs to the company is an attempt to obtain more than the buyers bargained for when they acquired GLL's stock.

In sum, GLL's attempt to shift the alleged liability of the company via a claim for contribution is contrary to bedrock corporate law as well as the parties' agreement governing the sale of GLL's stock. GLL cites no authority that in any way suggests that a claim for contribution can be used to shift a liability of a company from the company to its former owners.[6]

E. In Light of Its Recovery In the Arbitration GLL Cannot Seek a Double Recovery.

GLL's claim for contribution arises from the same underlying transaction and nucleus of facts as GLL's claims in the Arbitration. In the Arbitration GLL obtained an award in its favor.

---

[6] GLL also appears to argue in its brief that the ALJ should "pierce the veil" of GLL and hold the CJR Respondents and Olympus Respondents liable. However, GLL's argument is fatally flawed. When a court "pierces the veil", it holds *current* shareholders personally liable for the obligations of a company. GLL cites no authority whereby a court can pierce the veil and hold *former* owners personally liable for a company's current obligations. There is thus no basis to "pierce the veil". It would also be inappropriate for the ALJ to engage in a "piercing the veil" analysis when there is a detailed stock purchase agreement that was heavily negotiated between two highly sophisticated private equity firms to govern the rights and obligations of the current and former owners of GLL in connection with the sale of GLL and any resulting claims.

Furthermore, Mr. Rosenberg was not even an owner of GLL during the relevant period. This is an additional reason why there is no basis for holding Mr. Rosenberg liable under a "piercing the veil" theory.

That award compensated it for the risk of lawsuits by ocean carriers such as MOL. To allow GLL to recover contribution in this action would give GLL a double recovery and would contravene basic principles of res judicata.

1. Principles barring double recoveries and the doctrine of res judicata preclude GLL's cross-claim for contribution.

In the Arbitration GLL specifically sought a recovery for the risk of lawsuits by ocean carriers:

- The current owners of GLL acquired GLL on June 7, 2006. On June 6, 2007, the current owners served a Notice of Claim on the former owners pursuant to the indemnification provision in the SPA. The Notice of Claim specifically asserted claims by GLL against the former owners based on GLL's alleged potential liabilities to ocean carriers: " . . . the Company and its Subsidiaries redirected thousands of shipments to destinations other than those represented to ocean carriers and stated on ocean bills of lading, with the purpose and effect of deceiving ocean carriers and others and obtaining ocean transportation of property at less than the rates that would have applied if the ocean shippers had know the true destinations for those shipments. That conduct created potential liabilities for fines and damages . . . ." (Notice of Claims of Buyer Indemnified Parties ("Notice of Claims"), dated June 6, 2007, annexed hereto as Exhibit K, at pp. 2-3) (CJR App., at pp. 170-71).

- In its Statement of Claim in the Arbitration, GLL specifically alleged and sought damages based on alleged potential liabilities to third parties:

  55. These emails, . . . show that the statements in the Harris pitch book . . . were just lies – lies told as part of a complex, multi-year scheme by Cardenas, Mischianti, Rosenberg, and others to . . . (c) leave the new owners holding

millions of dollars in concealed contingent liabilities for potential fines and/or damages under the Shipping Act. . . .

77. It was also a costly fraud – one that caused the Purchasers to suffer more than $100,000,000 in actual damages. As the direct and proximate result of Global Link 2003's undisclosed and fraudulent 'practice of diverting cargo to [destinations] other than what's on the original [ocean bill of lading]," which . . . created potential liabilities for millions of dollars in fines and damages . . . Holdings 2003 and its subsidiaries were worth no more than $35,000,000 when the Fraud Respondents duped the Purchasers into signing the SPA on or about May 20, 2006.

84. [T]hat pattern and practice of wire fraud enabled the Fraud Respondents to . . . (c) leave Holdings 2003, Global Link 2003, and the Purchasers holding the bag: contingent liabilities for millions of dollars in potential fines and damages attributable to knowing violations of the wire-fraud statute, the RICO Act, the Shipping Act, and other applicable laws . . . .

(Claimants' Statement of Claim, annexed hereto as Exhibit L, at paras. 55, 77, 84) (CJR App., at pp. 194, 203, 205) (emphasis supplied).

- In later pleadings in the Arbitration, GLL continued to assert that the former owners had made misrepresentations to the buyers regarding GLL's pre-sale compliance with its contracts with the ocean carriers, including MOL, as well as regarding the non-existence of any liabilities above stated amounts:

61. In Section 4.09(b) of the SPA, they caused Holdings 2003 to represent and warrant that, with respect to each contract listed on Section 4.09 of the Disclosure Schedules, including service agreements between Global Link 2003 and ocean carriers CMA GMC (America), Inc., **Mitsui O.S.K. Lines, Ltd.**, and CP Ships USA, LLC. "(i) the agreement is valid and in full force and effect; (ii) neither the Company nor, to the knowledge of the Company, any other party, is in breach of or violation of, or default under, any such agreement such that the breach or default would result in a Loss of greater than $100,000; and (iii) no event has occurred... which, after the giving of notice, with lapse of time, or otherwise, would constitute a breach, violation or default by the Company or any of its Subsidiaries... such that the breach, violation or default would result in a Loss of greater than $100,000."

62. In Section 4.21 of the SPA, they caused Holdings 2003 to represent and warrant that, "[t]o the Company's knowledge (after due

inquiry), neither the Company nor any of its Subsidiaries is subject to any liability of a type that would appear on a balance sheet (other than any liability, together with the liabilities arising from all related items or events, as would not result in a Loss to the Company and its Subsidiaries in excess of $100,000) arising out of events, transactions or actions or inactions arising prior to the date hereof; except (i) liabilities under leases, licenses, contracts and agreements described in the Schedules hereto or under leases contracts and agreements which are not required to be disclosed thereon, (ii) liabilities arising out of or related to the transactions contemplated [by the SPA], (iii) liabilities reflected on the Latest Balance Sheet or liabilities which have arisen after the date of the Latest Balance Sheet in the ordinary course of business consistent with past practices and (iv) liabilities otherwise disclosed on the Schedules attached [to the SPA]."

(Claimants' Second Amended Statement of Claim, annexed hereto as Exhibit M, at paras. 61-62) (CJR App., at pp. 231-32) (emphasis supplied); *see also* (Claimants' Statement of Claim, at paras. 62-63) (CJR Exh. L) (CJR App. at pp. 197-98); (Claimants' Amended Statement of Claim, at paras. 62-63) (MOL Exh. AG) (MOL's Appendix ("MOL App."), at pp. 1454-55).

The Arbitration proceeded to a hearing on the merits. Both parties presented expert testimony, and GLL had the opportunity to have its expert(s) opine on the likelihood and anticipated amount of third-party liabilities. (Partial Final Award, at p. 4) (MOL Exh. A) (MOL's App., at p. 4). Following the hearing, post-hearing briefing, and closing arguments, the Panel issued its Partial Final Award, resolving all claims asserted and submitted in the Arbitration. (Partial Final Award, at p. 1) (MOL Exh. A) (MOL App., at p. 1). Significantly, in the Partial Final Award, the Panel noted that while in their Second Amended Statement of Claim Global Link had alleged misrepresentations by the Sellers based on the above representations in the SPA concerning its contracts with ocean carriers, Global Link did not rely upon these alleged theories

of recovery in their pre- or post-hearing submissions to the Panel: "In the Second Amended Statement of Claim, Claimants also invoked contractual representations regarding compliance with Global Link's contracts with the ocean carriers with which it dealt (§ 4.09(b)) and the non-existence of liabilities above stated amounts (§ 4.21). These representations are not mentioned in Claimants' Pre-Hearing Brief or Proposed Findings of Fact and Conclusions of Law, and we will not further address them." (Partial Final Award, at p. 5) (MOL Exh. A) (MOL App., at p. 5).

In the Partial Final Award, the Panel found that the Claimants were entitled to a damages award of $12 million. (Partial Final Award) (MOL Exh. A) (MOL App., at pp. 1-63). The buyers were awarded the difference between the actual value of GLL at the time of the closing date in light of the split routing practice, as determined by the Arbitrators, and the purchase price the buyers paid. *See* (Partial Final Award) (MOL Exh. A) (MOL App., at pp. 1-63). That award necessarily included an amount equal to the discount on the purchase price that resulted from the risk of potential liability to GLL's ocean carrier partners, including MOL, that resulted from split-routing. This is true regardless of whether GLL specifically asked the Panel to award damages based on potential liabilities to third parties (which GLL did in its pleadings), regardless of GLL's failure to present testimony at the Arbitration from a damages expert on potential liabilities to ocean carriers for which GLL had asserted it was entitled to recover (which GLL indisputably had the opportunity to do), and regardless of whether the Panel stated whether its damages award was intended to compensate GLL for potential third-party liabilities.

GLL was thus made whole as between it and its former owners by virtue of the Partial Final Award in the Arbitration and the former owners' subsequent satisfaction of the judgment rendered on that Partial Final Award. As reflected by its pleadings in the Arbitration, GLL undeniably contemplated the possibility of third-party lawsuits and potential liabilities to third-

parties when it brought the Arbitration and sought to recover from GLL's former owners. To award GLL further compensation from the former owners in this action would give GLL a double recovery, which GLL is barred from obtaining. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (*quoting General Telephone v. E.E.O.C.*, 446 U.S. 318, 333 (1980) ("[I]t 'goes without saying that the courts can and should preclude double recovery.'"); *Barker Capital LLC v. Rebus LLC*, No. 04C-10-269 MMJ, 2006 WL 246572, at *9 (Del. Super. Ct. Jan 12, 2006) (granting summary judgment dismissing claim for tortious interference with contract where "recovery for [that claim] would amount to double recovery"); *Infotec Staff Servs., Inc. v. First USA Bank*, No. Civ.A. 3:97–CV–1372P, 1998 WL 641816, at *5 (N.D. Tex. Sept. 17, 1998) ("The single satisfaction rule prevents a plaintiff from securing more than one recovery for the same injury.").

Furthermore, having sought compensation in the Arbitration for damages that GLL might be forced to pay in the future as a result of split-routing, GLL is barred by res judicata from pursuing the same or similar claims again. *See Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984) ("The doctrine of res judicata is that the parties to a suit and their privies are bound by a final judgment and may not relitigate any ground for relief which they already have had an opportunity to litigate – even if they chose not to exploit that opportunity – whether the initial judgment was erroneous or not. The judgment bars any further claim based on the same nucleus of facts, for it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies."); *Banks v. Int'l Union Elec., Elec., Technical, Salaried & Mach. Workers*, 390 F.3d 1049, 1052 (8th Cir. 2004) ("The preclusion principle of res judicata prevents 'the relitigation of a claim on grounds that were raised or could have been raised in the prior suit.'"); *Betts v. Townsends, Inc.*, 765 A.2d 531,

534 (Del. 2000) ("Under the doctrine of *res judicata*, a party is foreclosed from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties."); *Meding v. Hurd*, 607 F. Supp. 1088, 1096 (D. Del. 1985); *Hostetter v. Harford Ins. Co.*, No. 85C-06-28, 1992 WL 179423, at *6 (Del. Super. Ct. July 13, 1982); *Sanders v. Trinity Universal Ins. Co.*, 647 S.E.2d 388, 392 (Ga. Ct. App. 2007) ("[I]t is only where the merits were not and could not have been determined under a proper presentation and management of the case that res judicata is not a viable defense." (*quoting Green v. Bd. of Dirs. of Park Cliff*, 631 S.E.2d 769, 772 (Ga. Ct. App. 2006))); *Piedmont Cotton Mills, Inc. v. Woelper*, 498 S.E.2d 255, 257 (Ga. 1998) ("A litigant 'must discharge all his weapons, and not reserve a part of them for use in a future []encounter. He must realize that one defeat will not only terminate the campaign, but end the war.'" (*quoting Smith v. Bird*, 5 S.E.2d 336, 338 (Ga. 1939))); *see also Restatement (Second) of Judgments 2d* § 18 (1982) ("When a valid and final personal judgment is rendered in favor of the plaintiff, [it] cannot thereafter maintain an action on the original claim or any part thereof.");

2. GLL's arguments that its cross-claim is not an attempt at a double recovery and is not barred by res judicata are without merit.

GLL previously argued in response to the CJR Respondents and Olympus Respondents' motions to dismiss GLL's cross-claim that it was not precluded from pursuing its cross-claim because the Panel in the Arbitration did not account for potential third-party liabilities in its damages award. (GLL's Aug. 12, 2009 Response to the CJR Respondents' Motion to Dismiss GLL's Cross-Claims, at p. 23). GLL's argument is without merit.[7]

GLL pointed to language in the Panel's March 25, 2008 Partial Award and Decision on Respondents' Motion to Dismiss as purported evidence that the Panel considered claims based

[7] Notably, in making this argument, GLL acknowledged that, at the Arbitration, it had not presented a "foundation for such damages." (*Id.*)

on potential liabilities to be premature. (*Id.*) However, GLL's argument is misleading and does not place the Panel's statements in their proper context. The Panel's statements relate to the RICO claim asserted by GLL and other Claimants in the Arbitration. The Respondents had moved to dismiss the Claimants' RICO claim based in part on the fact that GLL had not suffered a "present injury" within the meaning of RICO. The Panel agreed with the Respondents' arguments and dismissed GLL's RICO claim. In doing so the Panel found only that potential third-party liabilities could not support a cognizable RICO claim, not that the Panel "considered these potential liabilities to be uncertain and untimely" as GLL's argued in its response to the CJR Respondents' Motion to Dismiss. (*Id.*)

Thus, contrary to GLL's arguments in its response to the CJR Respondents' Motion to Dismiss, the Panel's statements in its ruling on the Respondents' Motion to Dismiss do not address or even shed light on whether the Panel included potential third-party liabilities in its damages calculation in the Partial Final Award – an award which was issued eleven months *after* the Panel's ruling on the Respondents' Motion to Dismiss. In contrast, the Panel's statements in the Partial Final Award regarding GLL's abandonment of claims based on representations related to GLL's contracts with the ocean carriers and potential liabilities demonstrate that the Panel believed that any claims based on third-party liabilities could be and had been asserted (just that they could not be asserted in a RICO claim) – but that the Panel understood that GLL had elected to abandon such claims prior to the hearing.

Regardless of the Panel's statements with respect to GLL's RICO claim, GLL had the opportunity to present testimony, including expert testimony, at the Arbitration as to the amount of damages it allegedly suffered as a result of potential liabilities. The Panel heard the testimony and entered an award in the Claimants' favor. The damages awarded by the Panel represent the

difference between the actual value of GLL at the closing, as determined by the Arbitrators, and the purchase price paid. That amount necessarily encompasses any discount on the purchase price as a result of the risk of potential liability to MOL or others. Indeed, GLL acknowledged that this would be the case in opposing Respondents' efforts to dismiss GLL's RICO claim in the Arbitration: "Likewise, no such training is necessary to see that a company with a contingent liability for material fines or damages is worth less than the same company without such a liability. Of course, experts often disagree about the dollar impact that a particular level of EBITDA or a particular contingent liability would or should have on the value of a particular company at a particular time. Such disagreements are resolved at trial – not by motion to dismiss." (Claimants' Response to Respondents' Motions to Dismiss in the Arbitration, annexed hereto as Exhibit N, at p. 24) (CJR App., at p. 263).

GLL was thus compensated by its former owners for the alleged liability to MOL through the Arbitration and the former owners' satisfaction of the Partial Final Award entered in the Arbitration. GLL's cross-claim for contribution should therefore be rejected as to allow GLL to pursue contribution in this action would give GLL a second bite at the apple and a windfall. *See also* (SPA, at para. 10.02(f)) (CJR Exh. J) (CJR App., at p. 138) ("The Buyer Indemnified Parties shall not be entitled to recover any Losses relating to any matter arising under one provision of this Agreement to the extent that the Buyer Indemnified Parties had already recovered Losses with respect to such matter pursuant to other provisions of this Agreement.")).

F. **GLL is Estopped by Specific Findings Made in the Arbitration.**

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral

estoppel and res judicata apply to arbitration proceedings. *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1370-71 (S.D. Fla. 2003) ("[A]n arbitration decision can have res judicata effect as to all matters embraced in the controversy submitted to the arbitrator, just as a judgment by a court can have res judicata effect. 'When an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity to present evidence, the determination of issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated.'" (citations omitted) (*citing Greenblatt v. Drezel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985)); *Dimacopoulos v. Consort Dev. Corp.*, 552 N.Y.S.2d 124, 126 (N.Y. App. Div. 1990) ("It is fundamental that the doctrines of res judicata and collateral estoppel apply to issues resolved in an earlier arbitration proceeding.").[8]

1. GLL is estopped by the finding in the Arbitration that MOL was aware of the practice of split routing.

The Panel in the Arbitration found that "[a]s for the carriers' knowledge, there is clear evidence that a senior sales representative of Mitsui knew that Global Link was engaged in split routing, and Mitsui did not object—indeed, Mitsui encouraged continuation of the practice—because Mitsui preferred not to be bothered with negotiating a multiplicity of door points." (Partial Final Award, at p. 10) (MOL Exh. A) (MOL App., at p. 10). As Commissioner Khouri stated, GLL is bound by this finding: "As noted above, the Commercial Arbitration Tribunal found 'clear evidence' that Mitsui knew of, condoned, endorsed, and encouraged Global Link's practice of split-routing. Under collateral estoppel, Global Link may not relitigate this issue of fact. As a result of Global Link's voluntary initiation and participation in the arbitration, Global Link is now bound by this factual finding. The fact that the practice was open, known,

[8] GLL does not dispute that collateral estoppel applies and it is bound by the Panel's findings with respect to its cross-claim against the CJR Respondents and the Olympus Respondents. (GLL's Cross-Claim Brief, at pp. 15-16).

acknowledged, endorsed and encouraged by Mitsui defeats Global Link's cross-claims under 10(a)(1) given, that as noted above, that bad faith or deceit/concealment are essential elements of an 'unjust or unfair device or means' pursuant to Commissior regulation, 46 C.F.R. § 545.2." August 1, 2011 Commission Order, at 81 (Commissioner Khouri, concurring in part and dissenting in part) (discussing reasons for adherence to doctrines of res judicata and collateral estoppel).

Because GLL is bound by the Panel's finding that MOL was aware of the practice of split routing, GLL's cross-claim against the CJR Respondents fails.

2. GLL is estopped from arguing that the CJR Respondents participated in any Shipping Act violations.

GLL argues that the CJR Respondents engaged in actions which violated the Shipping Act. However, GLL's argument ignores the fact that findings in the Arbitration demonstrate the opposite – that the CJR Respondents did not violate the Shipping Act. GLL is bound by those findings, which preclude GLL's cross-claim.

First, GLL suggests in its brief that the Panel in the Arbitration found that the CJR Respondents were willing and knowledgeable participants in the alleged Shipping Act violations. However, the Panel made no such finding, and the Panel's Partial Final Award in no way supports GLL's suggestion that there was a finding in the Arbitration that the CJR Respondents participated in any specific transactions at issue in the case. Significantly, the Panel specifically found that "[by] 2005 Rosenberg was becoming less and less active in running Global Link." (Partial Final Award, at p. 33) (MOL Exh. A) (MOL App., at p. 33). GLL is bound by the Panel's finding, which further demonstrates that Mr. Rosenberg did not participate in any transactions in which a Shipping Act violation allegedly occurred.

GLL is also bound by the Panel's finding that the former owners of GLL were not aware that the practice of split routing is illegal. One purported basis for GLL's fraud claim in the Arbitration was that the representation in the SPA that GLL was legally compliant was fraudulent. To prove that this representation was fraudulent GLL had to prove not only that the representation was false but also that the former owners knew it was false when they made the representation. Relying on the fact that in 2003 Mr. Rosenberg and others had sought and received advice from counsel regarding the legality of split routing and that they attempted to follow the advice they received, the Panel concluded that GLL had not proven that the former owners' representation regarding GLL's legal compliance was fraudulent. That is, the Panel found that GLL had not proven that the former managers knew that split routing violated the Shipping Act. (Partial Final Award, at pp. 16-21) (MOL Exh. A) (MOL App., at pp. 16-21).

GLL is bound by this finding under the doctrine of collateral estoppel. As such, for purposes of GLL's cross-claim for contribution, GLL cannot be found to have *willfully* violated the Shipping Act when engaging in split routing under the former managers' management. Because GLL is bound by this finding, GLL's contribution claim against the CJR Respondents fails.

3. GLL's arguments that it is "blameless" are without merit in light of findings in the Arbitration.

GLL argues that it is an "innocent party" who should not shoulder the blame if it is found liable to MOL. GLL also argues that it acted as quickly as possible to terminate the practice of split routing. Findings made by the Panel in the Arbitration – which GLL is bound by – directly contradict GLL's arguments: "In assessing Claimants' position in this matter, a few points bear noting. First, not only did Meyer, Briles and the other members of Global Link management team who had allegedly deceived GTCR in the negotiations remain in the employ of the new

Company; there is no evidence in the record that they were disciplined or chastised. Second, there is no mention of split-routing as being illegal or otherwise in the post-acquisition Board minutes of Global Link Logistics or GTCR's periodic reports to its investors or bank lenders. . . . Finally, Claimants did not self-report to the FMC until May 21, 2008 ...-- nearly two months after learning of split-routing practice. Rocheleau testified that it took 'some time' to quantify the extent of split-routing, but that fact does not explain the delay of a further year or more in notifying the FMC . . . ." (Partial Final Award, at p. 15) (MOL Exh. A) (MOL App., at p. 15).

The reality is thus that GLL and its new owners are not naïve and innocent bystanders. To the contrary, GLL continued the practice of split routing until its new owners realized it was unable to manage the company as effectively and profitably as the former owners, and then decided to use the practice of split routing to try to obtain a recovery from the former owners.

The findings set forth above from the Arbitration demonstrate that GLL is not blameless and is in fact at fault and therefore should not be entitled to shift "blame" to the CJR Respondents. At a minimum, GLL certainly cannot shift any blame to the CJR Respondents for any transactions taking place following the closing of the sale of GLL on June 7, 2006.

G. GLL's Cross-Claim Is Barred By the Documents Executed in Connection with the 2006 Sale.

1. The SPA precludes GLL's cross-claim.

Section 10.02(c) of the SPA provides in pertinent part: "... From and after the Closing, and subject to Section 10.02(h), this Section 10.02 constitutes the Buyer Indemnified Parties' sole and exclusive remedy for any and all Losses or other claims relating to or arising from this Agreement and the transactions contemplated hereby; provided that nothing in this Section 10.02(c) or this Article X shall in any way limit or restrict the parties' right and remedies in respect of the Shareholder Release, Confidentiality, Non-Competition and Non-Solicitation

Agreement." (SPA, at para. 10.02(c)) (CJR Exh. J) (CJR App., at p. 137). This provision thus unequivocally bars GLL's cross claim.

Further, because the cross-claim arises out of the SPA, the Court lacks subject matter jurisdiction as Congress specifically excluded purchase agreements from the purview of the Shipping Act and thus the scope of the Commission's jurisdiction. *See* 46 U.S.C. § 40301(c) ("This [Act] does not apply to an acquisition by any person, directly or indirectly, of any ... assets of any other person."). GLL's cross-claim for contribution should be dismissed for these reasons as well.

2. The SPA limits GLL's remedies against Mr. Rosenberg.

Under the SPA, GLL cannot seek recourse against Mr. Rosenberg except based on CJR's inability to satisfy its own indemnification liability. Section 10.10 of the SPA provides:

> 10.10 Limitation on Recourse. **No claim shall be brought or maintained by Buyer or any of its Subsidiaries or their respective successors or permitted assigns against any officer, director, or employee (present or former)** or Affiliate of any party hereto which is not otherwise expressly identified as a party hereto, and no recourse shall be brought or granted against any of them, by virtue of or based upon any alleged misrepresentations or inaccuracy in or breach of any of the representations, warranties or covenants of any party hereto set forth or contained in this Agreement or any exhibit or schedule hereto or any certified delivered hereunder; **provided that the limitation set forth in this Section 10.10 shall not be applicable with respect to any particular Seller entity to the extent that such Seller entity makes a distribution, liquidation or other transfer of funds causing such Seller entity to be incapable of performing its indemnification obligations hereunder.**

(SPA, para. 10.10) (CJR Exh. J) (CJR App., at p. 142) (emphasis supplied). In its cross-claim, GLL does not allege CJR's inability to meet its indemnification obligations.

Accordingly, Section 10.10 of the SPA bars GLL from seeking any recourse against Mr. Rosenberg.

3. GLL released Mr. Rosenberg.

In conjunction with the SPA, on May 20, 2006, Mr. Rosenberg executed a Release, Confidentiality, Non-Compete and Non-Solicitation Agreement between he and GLL (the "Rosenberg Agreement"). (Rosenberg Agreement, annexed hereto as Exhibit O) (CJR App., at pp. 265-75). The Rosenberg Agreement contains an additional broad general release of any claims which Global Link has or might have against Mr. Rosenberg:

> 1.1.2 Each Acquired Company [GLL Holdings, Inc. and its subsidiaries, including Global Link] hereby releases and discharges each Seller, and each of their respective past and present officers, directors, employees and agents (individually, a "Company Releasee" and collectively, the "Company Releasees") from any and all claims, demands, actions, arbitrations, audits, hearings, investigations, litigations, suits (whether civil, criminal, administrative, investigative or informal), causes of actions, orders and liabilities whatsoever, ***whether known or unknown, suspected or unsuspected, contingent or otherwise***, both at law and inequity, of any kind, character or nature whatsoever ("Claims") which such Acquired Company now has or has ever had against the respective Company Releasees relating in any way to (a) such Company Releasee's indirect or direct ownership of any debt or equity securities issues by an Acquired Company (including, without limitation, such Company Releasee's services as an officer and/or director of the Company or any of its Subsidiaries) . . . provided that the foregoing Company Release and discharge shall not relieve any Company Releasee of their respective obligations or liabilities to any Acquired Company pursuant to the Purchase Agreement, this Agreement or the other Transaction Documents (including, without limitation, any indemnification obligations thereunder). Each Acquired Company understands and agrees that it is expressly waiving all Claims against the Company Releasees covered by the Company Release, including, but not limited to, those Claims that it may not know of or suspect to exist which, if known, may have materially affected the decision to provide the Company Release, and each Acquired Company expressly waives any rights under applicable law that provide to the contrary.

(Rosenberg Agreement, para. 1.1.2) (CJR Exh. O) (CJR App., at pp. 266-67).

This provision releases Mr. Rosenberg from the contribution GLL seeks via the cross-claim. GLL's cross-claim should thus be dismissed as to Mr. Rosenberg.

H. GLL's Claim for Contribution Should Be Rejected for Other Reasons.

The CJR Respondents argued in their Motion to Dismiss GLL's Cross-Claim that there is not a cause of action for contribution under the Shipping Act and that this Court therefore lacks subject matter jurisdiction. The ALJ granted the CJR Respondents' motion. While the Commission reinstated GLL's cross-claim for contribution, for preservation purposes the CJR Respondents reassert their argument herein. *See* August 1, 2011 Commission Order, at 55-56 (Commissioner Dye, concurring in part and dissenting in part) (" . . . there is nothing in the Shipping Act itself or its legislative history, expressly or implicitly, to indicate that Congress intended to create a right of contribution. In addition, the purpose of the Shipping Act is not to protect the respondent in this case, Global Link, but to regulate its activities. . . . The majority's conclusion that there is nothing in the Shipping Act of 1984 to preclude a right of contribution is insufficient to create a right of action for contribution under the Shipping Act.").

The CJR Respondents show further that, to the extent the ALJ finds that MOL's claims have merit (which the CJR Respondents vigorously dispute), GLL's cross-claim for contribution still fails to state a claim for relief for the reasons previously articulated by the ALJ: "If Mitsui proves its claims, it will demonstrate that Global Link enjoyed a *benefit* (at least in the short term) from its Shipping Act violations by paying less than the rates or charges lawfully required by the Act. If Global Link is required to pay the undercharges as reparations, Mitsui will be made whole and Global Link would then have paid in full the rates and charges lawfully required by the Act and be in the position it would have been if it had not violated the Act in the first place. There is no authority cited supporting a finding that when a shipper is required to pay the

full rates and charges lawfully required by the Act, it suffers an actual injury within the meaning of the Act. Global Link can prove no set of facts that would establish that it will suffer an actual injury within the meaning of the Shipping Act if it is required to pay the full rates and charges lawfully required by the Act as reparations to Mitsui." *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc. et al.*, FMC No. 09-01, at 30 (ALJ June 22, 2010) (Memorandum and Order on Motions to Dismiss) (emphasis in original). GLL's cross-claim for contribution is without merit for this reason as well.

The CJR Respondents also reassert their previous argument that the ALJ lacks subject matter jurisdiction over GLL's cross-claim because it is the subject of a mandatory arbitration provision. (SPA, at para. 10.08(a)) (CJR Exh. J) (CJR App., at p. 140) ("The parties hereto agree that the arbitration procedure set forth below **shall be the sole and exclusive method for resolving and remedying claims for money damages arising out of this Agreement** (the "**Disputes**"), except as provided by Article I above...") (emphasis supplied)).

CONCLUSION

For all of the reasons set forth herein, the ALJ should find in favor of the CJR Respondents on GLL's cross-claim for contribution.

Respectfully submitted,

Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
GROVE, JASKIEWICZ and COBERT, LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Benjamin I. Fink (bfink@bfvlaw.com)
Neal F. Weinrich (nweinrich@bfvlaw.com)
BERMAN FINK VAN HORN P.C.

3475 Piedmont Rd., Suite 1100
Atlanta, Georgia 30305
Tel: (404) 261-7711
Fax: (404) 233-1943

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg

Dated: May 1, 2013

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2013, I have this day served the foregoing document upon the following individual(s):

David Street (dstreet@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
GKG Law, PC
1054 31st Street, Ste. 200
Washington, D.C. 20007
(via electronic mail and hand delivery)

Attorneys for Respondent Global Link Logistics, Inc.

Marc J. Fink (mfink@cozen.com)
Cozen O'Connor
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
(via electronic mail and hand delivery)

David Y. Loh (dloh@cozen.com)
Cozen O'Connor
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
(via electronic mail and Federal Express)

Attorneys for Complainant Mitsui O.S.K. Lines, Ltd.

Warren L. Dean
(wdean@thompsoncoburn.com)
C. Jonathan Benner
(jbenner@thompsoncoburn.com)
Harvey Levin (hlevin@thompsoncoburn.com)
Kathleen E. Kraft
(kkraft@thompsoncoburn.com)
Thomson Coburn LLP
1909 K Street, N.W., Ste. 600
Washington, D.C. 20006
(via electronic mail and hand delivery)

Andrew G. Gordon (agordon@paulweiss.com)
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(via electronic mail and Federal Express)

Attorneys for Respondents Olympus Partners, L.P.; Olympus Growth Fund III, L.P.; Olympus Executive Fund, L.P.; Louis J Mischianti; David Cardenas and Keith Heffernan

Ronald N. Cobert (rcobert@gjcobert.com)
Andrew M. Danas (adanas@gjcobert.com)
GROVE, JASKIEWICZ and COBERT, LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg

511067